

2005

# Utah Public Employees Association and Roes 1 through 5 v. State of Utah : Brief of Appellant

Utah Court of Appeals

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Clark Waddoups; Heidi E.C. Leithead; David C. Reymann; Cheylynn Hayman; Parr Waddoups Brown Gee & Loveless; Thomas R. Lee; Attorneys for Appellee.

Benson L. Hathaway, Jr.; Alexander Dushku; Matthew K. Richards; Stephen W. Geary; Kirton & McConkie; Attorneys for Appellants.

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**IN THE UTAH SUPREME COURT**

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UTAH PUBLIC EMPLOYEES	:	
ASSOCIATION and ROES 1 through 5,	:	
	:	
Plaintiffs/Appellants,	:	Supreme Court No.: 20051165
	:	
vs.	:	
	:	District Court Civil No.: 050911548 mi
STATE OF UTAH,	:	
	:	
Defendant/Appellee.	:	
	:	

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**APPELLANTS' ADDENDUM**

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**ON APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH,  
HONORABLE WILLIAM W. BARRETT**

---

Clark Waddoups  
Heidi E.C. Leithead  
David C. Reymann  
Cheylynn Hayman  
**PARR WADDOUPS BROWN GEE &  
LOVELESS**  
185 South State Street, Suite 1300  
Salt Lake City, Utah 84111

Thomas R. Lee  
524 JRCB  
Brigham Young University  
Provo, Utah 84602-8000

*Attorneys for Appellee*

Benson L. Hathaway, Jr. (#4219)  
Alexander Dushku (#7712)  
Matthew K. Richards (#7972)  
Stephen W. Geary (# 9635)  
**KIRTON & McCONKIE**  
60 East South Temple, Suite 1800  
P.O. Box 45120  
Salt Lake City, Utah 84145-0120

*Attorneys for Appellants*

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David C. Reymann  
Cheylynn Hayman  
**PARR WADDOUPS BROWN GEE &  
LOVELESS**  
185 South State Street, Suite 1300  
Salt Lake City, Utah 84111

Thomas R. Lee  
524 JRCB  
Brigham Young University  
Provo, Utah 84602-8000

*Attorneys for Appellee*

Benson L. Hathaway, Jr. (#4219)  
Alexander Dushku (#7712)  
Matthew K. Richards (#7972)  
Stephen W. Geary (# 9635)  
**KIRTON & McCONKIE**  
60 East South Temple, Suite 1800  
P.O. Box 45120  
Salt Lake City, Utah 84145-0120

*Attorneys for Appellants*

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Clark Waddoups (3957)  
Heidi E. C. Leithead (5102)  
David C. Reymann (8495)  
Cheylynn Haymann (9793)  
PARR WADDOUPS BROWN GEE & LOVELESS  
185 South State Street, Suite 1300  
Salt Lake City, UT 84111  
Telephone: 801/532-7840  
Telefax: 801/532-7750

Thomas R. Lee (5991)  
524 JRCB, Brigham Young University  
Provo, UT 84602-8000  
Telephone: 801-422-9024

Attorneys for State of Utah

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

---

UTAH PUBLIC EMPLOYEES	)	
ASSOCIATION and ROES 1 through 5,	)	
	)	<b>FINDINGS OF FACT</b>
Plaintiffs,	)	<b>AND</b>
	)	<b>CONCLUSIONS OF LAW</b>
vs.	)	
	)	
STATE OF UTAH,	)	
	)	Civil No. 050911548 mi
Defendant.	)	
	)	Judge William W. Barrett

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Plaintiffs Utah Public Employees Association and Roes 1 through 5 ("plaintiffs") filed this action challenging House Bill 213 ("HB 213"), which makes certain changes to the Unused Sick Leave Retirement Option Program set forth in Utah Code Ann. §§ 67-19-14 to 67-19-14.4

(2004 & Supp. 2005). In their Amended Complaint, plaintiffs assert causes of action against the State of Utah arising from the passage of HB 213 for (1) unconstitutional taking, (2) breach of contract, and (3) estoppel.

Plaintiffs filed a motion for preliminary injunction seeking to enjoin HB 213 from becoming effective as scheduled on January 1, 2006. Defendant State of Utah (“defendant” or “State”) filed an opposition to plaintiffs’ motion for preliminary injunction and filed a cross-motion for judgment on the pleadings as to each of the three counts set forth in the Amended Complaint. This Court heard evidence with respect to plaintiffs’ motion for preliminary injunction on November 7, 9, and 16, 2005. The Court heard arguments regarding plaintiffs’ motion for preliminary injunction and defendant’s motion for judgment on the pleadings on November 18, 2005. Plaintiffs were represented at the hearing by Benson L. Hathaway, Jr., Stephen W. Geary, and Kenneth Birrell of the firm of Kirton & McConkie. Defendant was represented at the hearing by Clark Waddoups, Heidi E. C. Leithead, David C. Reymann, and Cheylynn Hayman of the firm of Parr Waddoups Brown Gee & Loveless.

Based on the evidence presented, the Court makes the following findings of fact and conclusions of law relevant to its ruling on plaintiffs’ motion for preliminary injunction. To the extent any of the following findings of fact is also a conclusion of law, it shall be treated as a conclusion of law. To the extent any conclusion of law is also a finding of fact, it shall be treated as a finding of fact. To the extent a finding of fact or a conclusion of law is a mixed question of fact and law, it shall be treated both as a finding of fact and as a conclusion of law. In addition, to the extent a finding of fact or conclusion of law applies to any of plaintiffs’ three causes of

action for purposes of plaintiffs' motion for preliminary injunction, and notwithstanding any heading set forth in the findings or conclusions, the finding and/or conclusion shall be construed to so apply.

#### Findings of Fact

1. In 1979, the Utah Legislature enacted statutory provisions under which public employees could be compensated for their unused sick leave. These provisions were later incorporated into the current Unused Sick Leave Retirement Option Program (the "Program"), as set forth in Utah Code Ann. § 67-19-14.2 (2004).

2. The Program presently allows agencies to offer its terms to employees who are eligible to receive retirement benefits in accordance with Title 49, Utah State Retirement and Insurance Benefit Act. *See* Utah Code Ann. § 67-19-14.2(1)(b).

#### The Program

3. Under the current provisions of the Program, an employee who chooses, on retirement, to participate in the Program will receive State-paid continuing medical and life insurance benefits until either the employee is eligible for Medicare (e.g., turns age 65) or for up to five years, whichever occurs first. This benefit is awarded without regard to whether an employee has accumulated any unused sick leave hours. *See* Utah Code Ann. § 67-19-14.2(2)(b).

4. An employee who elects at retirement to participate in the Program may elect to use the first 25% of his or her unused accumulated sick leave as follows:

- a. Take all or part of this payout in cash, calculated at the employee's rate of pay at the time of retirement;
- b. Have all or part of this payout transferred directly to the employee's 401(k) defined compensation plan, calculated at the employee's rate of pay at the time of retirement; and/or
- c. After a mandatory deduction of 480 hours, use all or part of the remaining balance to purchase continuing medical and life insurance benefits at the rate of one month's coverage per policy for every eight hours of sick leave (the "8-hours-to-1-month ratio").

*See Utah Code Ann. § 67-19-14.2(2), (4)(a).*

5. After making the election as to the first 25% of his or her accumulated sick leave, a retiring employee may use his or her remaining unused sick leave to purchase continuing medical and life insurance benefits at the 8-hours-to-1-month ratio for the employee and/or the employee's spouse. *See Utah Code Ann § 67-19-14.2(4).*

6. As currently structured, the 480-hour mandatory deduction applies without regard to the employee's age at retirement. The State will deduct 480 hours from the accumulated sick leave of an employee who retires after the age of 60 even though he or she will receive less than five years of coverage under the State-paid continuing medical and life insurance benefit. Employees who retire after age sixty-five are subjected to the mandatory 480-hour deduction but nonetheless receive *no* State-paid continuing medical and life insurance benefit. *See Utah Code Ann. § 67-19-14.2.*

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7. All or substantially all State agencies offer the Program to their employees.

House Bill 213

8. In 2005, the Utah Legislature passed HB 213, which goes into effect on January 1, 2006. Because it has not yet gone into effect, no State employee has yet retired under and been subjected to the provisions of HB 213.

9. HB 213 creates two different programs, depending on when the sick leave is earned: Program I and Program II.

"Program I"

10. Program I applies to all sick leave accrued on or before December 31, 2005. *See* HB 213 § 67-19-14.2.<sup>1</sup> Program I makes essentially two changes to the ways in which sick leave accumulated through December 31, 2005, may be used as compared to the current Program.

11. First, beginning in 2006, HB 213 phases out the provision providing for up to five years of State-paid continuing medical and life insurance benefits by one year each year over the next five years, until the provision is phased out altogether. *Compare* Utah Code Ann. § 67-19-14.2(2)(b), *with* HB 213 § 67-19.14.2(2)(b)(ii). Thus, depending on the year of retirement, a qualified, retiring employee will receive State-paid coverage for the following number of years or until reaching age sixty-five, whichever occurs first:

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<sup>1</sup> A correct citation to the legislation enacted under HB 213 would be Utah Code Ann. § 67-19-14.2 (Supp. 2005) (effective January 1, 2006). To avoid confusion between the current and subsequent statutes, however, the Court will cite provisions from HB 213 as "HB 213 § 67-19-X." All citations to the Utah Code Annotated will refer to the applicable statute currently in effect.

<u>Year of Retirement</u>		<u>State-Paid Coverage</u>
In 2006	→	up to 5 years of automatic benefit
In 2007	→	up to 4 years of automatic benefit
In 2008	→	up to 3 years of automatic benefit
In 2009	→	up to 2 years of automatic benefit
In 2010	→	up to 1 year of automatic benefit
In 2011+	→	No automatic benefit / benefit is phased out

See HB 213 § 67-19.14.2(2)(b)(ii).

12. At the same time it is phasing out the automatic State-paid coverage, HB 213 reduces the 480-hour mandatory sick leave deduction by 96 hours per year—the equivalent of twelve months or one year of continuing medical and life insurance benefits calculated using the 8-hours-for-1-month ratio—until the mandatory reduction is eliminated entirely. See HB 213 § 67-19-14.2(4)(a)(ii). Again, depending on the year of retirement, the 480-mandatory deduction is phased out as follows:

<u>Year of Retirement</u>		<u>Mandatory Deduction in Accrued Sick Leave Hours</u>
In 2006	→	480 hours are deducted (i.e., 5 years)
In 2007	→	384 hours are deducted (i.e., 4 years)
In 2008	→	228 hours are deducted (i.e., 3 years)
In 2009	→	192 hours are deducted (i.e., 2 years)
In 2010	→	96 hours are deducted (i.e., 1 year)
In 2011+	→	No hours are deducted/deduction phased out

See HB 213 § 67-19-14.2(4)(a)(ii).

13. Second, HB 213 affects how a retiring employee may use some or all of the first 25% of his or her accumulated unused sick leave. Compare Utah Code Ann. § 67-19-14.2(2)(a), with HB 213 § 67-19-14.2(2)(a). Under HB 213, the State will convert the first 25% of an employee's accumulated sick leave hours into their cash value, calculated by multiplying the number of hours by the employee's rate of pay at the time of retirement. See HB 213 § 67-19-

14.2(2)(a). The State will then place this amount into the employee's 401(k) plan up to the maximum amount allowed by federal law. If the converted cash amount exceeds the federal contribution limitations applicable to 401(k) defined contribution plans on the date of retirement, any remainder the State is unable to place in the employee's 401(k) plan will be converted back into unused sick leave hours, added to the remaining 75% of the retiring employee's accumulated Program I sick leave hours, and used to purchase continuing medical and life insurance benefits at the rate of 8-hours-for-1-month ratio, minus any mandatory deductions required between 2006 and 2010. *See id.* § 67-19-14.2(3).

"Program II"<sup>2</sup>

14. Program II applies for all unused sick leave accumulated on or after January 1, 2006. *See* HB 213 § 67-19-14.4.

15. As with Program I hours, the State will convert the first 25% of an employee's Program II accumulated sick leave hours into their cash value, based on the employee's rate of pay at the time of retirement. *See* HB 213 § 67-19-14.4(2)(a), (c). The State will then place this amount into the employee's 401(k) plan, up to the limit allowed by federal law. If the converted cash amount exceeds the federal 401(k) contribution limitations, any remainder the State is unable to place in the employee's 401(k) plan will be placed into a medical expenses health reimbursement account. *See id.* § 67-19-14.4(2)(b).

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<sup>2</sup> Plaintiffs have not asserted any claim based on the Program II provisions of HB 213, which apply solely to sick leave accrued after HB213 becomes effective. These findings are provided for context.



16. The remaining 75% of accumulated Program II sick leave hours will also be placed into a medical expenses health reimbursement account. *See* HB 213 § 67-19-14.4(2)(a)(ii). Funds from this account may be used by the retired employee to purchase insurance coverage at the then-current cost of insurance, not at a guaranteed 8-hours-to-1-month ratio, or to pay other post-retirement qualified medical expenses. *See id.*

#### Additional Findings Regarding HB 213

17. For purposes of the priority with which funds will be placed into a retired employee's 401(k) plan, the Governor's Office has directed the State to place any cash contributions (e.g., deferred salary, accrued vacation, employer contributions) first, Program II hours second, and Program I hours last, unless an employee requests otherwise. The Governor's Office instructed the Department of Human Resource Management to adopt this prioritization to benefit employees who are seeking to maximize their unused sick leave retirement benefit because it preserves some or all of their Program I hours to purchase additional health insurance at the 8-hours-for-1-month ratio.

18. By retiring earlier in the year to minimize the federal 401(k) contribution and because of the priorities directed by the Governor, a retiring employee can reduce, and in some instances eliminate, the number of Program I hours placed in his 401(k) account, thereby preserving the number of Program I hours available to purchase medical and life insurance benefits at the 8-hours-to-1-month ratio.

19. Nonetheless, employees continue to be able to choose their own date of retirement, depending on numerous individualized factors and circumstances, including whether

they wish to maximize their ability to purchase medical and life insurance benefits or wish to maximize the amount of money placed into their 401(k) account.

20. Although HB 213 changes the ways in which an employee may use up to 25% of his or her unused Program I sick leave upon retirement, HB 213 does not eliminate *any* unused sick leave a State employee has accumulated prior to January 1, 2006. After the 25% deduction, if any, HB 213 also does not affect an employee's ability to use his Program I hours to purchase health and life insurance benefits at the 8-hours-for-1-month ratio. *See* HB 213 § 67-19-14.2.

21. With respect to Program I hours, under HB 213, and depending on retiring employees' individualized circumstances and date of retirement, retiring employees (i) may receive and/or be able to purchase less retiree medical and life insurance benefits, (ii) may receive and/or be able to purchase the same amount of retiree medical and life insurance benefits, or (iii) may be able to receive and/or purchase more retiree medical insurance benefits than they could under the current Program.

22. The Court finds that it is clear through the evidence presented that some public employees will be entirely unaffected by HB 213, some may be adversely impacted, and some may be significantly benefited. Therefore, HB 213 does not work a substantial injustice to every State employee.

23. Relying on Note 17 to the State of Utah Comprehensive Annual Financial Report for the fiscal year ending June 30, 2004, plaintiffs argued that the State has estimated the cost of the Unused Sick Leave Retirement Option Program to the State at \$240,538,000 and that the State has set aside \$348,104,000 million in net designated accrued taxes to fund this benefit.

24. The Court finds that plaintiffs' argument is not supported by the testimony of John Reidhead, the State's Director of Finance, and that the \$348,104,000 in net designated accrued taxes is a figure against which certain liabilities for the State for the current fiscal year, including postemployment benefit and Medicaid, may be recorded for accounting purposes.

25. The Court further finds that the cumulative postemployment benefits liability of \$240,538,000 set out in Note 17 to the State of Utah Comprehensive Annual Financial Report is an estimate of the cost of the Unused Sick Leave Retirement Option Program based on the cost of insurance as of June 30, 2004. Because of the unpredictable cost of health insurance benefits in the future, the State cannot accurately determine the cost of the Program at five, ten or more years into the future.

26. When discussing the adoption of HB 213, the Utah Legislature received information from representatives of the Department of Human Resource Management, the Department of Finance, the Utah State Retirement System, and the Public Employees Health Program regarding the Unused Sick Leave Retirement Option Program.

27. The Utah Legislature received information regarding the escalating cost of health insurance coverage during the period from fiscal year 2001 through fiscal year 2005 (estimated). The information provided the Utah Legislature showed that the State paid, on behalf of presently retired State employees only, the following premium amounts for the years 2001 through 2005:

FY 2001	\$ 8,792,034
FY 2002	\$10,719,970
FY 2003	\$12,659,540
FY 2004	\$14,123,300

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FY 2005      \$15,840,000 (est.)<sup>3</sup>

28. The Utah Legislature also received information regarding possible tax liability that could result under the current Program from the retiring employees' constructive receipt of the value of their accumulated sick leave at the time of retirement, even if employees chose to use their sick leave to purchase health insurance rather than taking its cash value.

29. By removing an employee's option to cash out the first 25% of his or her accumulated sick leave, HB 213 eliminates the potential tax liabilities that could arise based on a retiring employee's constructive receipt of those funds.

30. The Utah Legislature also received information regarding pending changes to the accounting standards issued by the Governmental Accounting Standards Board ("GASB") that will require a State to either (i) create and fund a trust fund to cover the cost of post-retirement benefits for State employees or (ii) report the liability, based on an actuarial study, of post-retirement benefits in its annual financial statements.

31. The Utah Legislature had a legitimate interest in addressing the potential cost of funding the Unused Sick Leave Retirement Option Program into the future and in determining how the State's revenues will be spent. In addition, the Utah Legislature had a legitimate interest in addressing potential tax liabilities arising under the Unused Sick Leave Retirement Option Program and the impact of the cost of the Unused Sick Leave Retirement Option Program on the State's financial reports given changes in the GASB standards.

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<sup>3</sup> This information was presented to the Utah Legislature during the 2005 legislative session. Thus, the 2005 figure was an estimate.

32. The Utah Department of Finance recently provided to the Utah Legislature a summary, dated November 1, 2005, of a draft actuarial study required by the new GASB standards and prepared at the request of the Department of Finance regarding the cost of post-employment benefits, which takes into account the passage of HB 213. That summary indicated that, if the State elects to set up a trust fund or equivalent arrangement to cover the cost of postemployment benefits, it will need to fund such a trust in the amount of \$536,032,918, to be funded through annual contributions to the trust in the amount of \$51,408,684. If the State chooses not to set up a trust fund, the State will be required to reflect an unfunded actuarial accrued liability on its books of \$827,910,942, amortized over a period of 25 years.

33. The Court finds that HB 213 does not effect an unconstitutional taking of plaintiffs' property.

34. As to the use of their accumulated sick leave at retirement, the Court finds that plaintiffs do not have a property right to use their accumulated sick leave to purchase health and life insurance under the Program because they have not retired and therefore have not satisfied all conditions necessary to vest any right they may have had under the Program

35. The Court finds that the terms of the Unused Sick Leave Retirement Option Program are derived solely from the express language of the statute and do not create a contract between the State and its employees, including plaintiffs.

36. The Court finds that, with respect to their estoppel claim, plaintiffs cannot show (a) that an injustice would result from every application of HB 213 and (b) that there is no substantial adverse effect on public policy.

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## Conclusions of Law

### Breach of Contract

1. In Utah, the rights of public employees generally are statutory, not contractual.
2. Under existing Utah law, a public employee has a vested contractual right to receive certain employer-provided benefits only when he has satisfied all conditions precedent to receiving the benefits, i.e., he has attained retirement age or has been medically disabled. *See Hansen v. Public Emp. Retirement Sys. Bd. of Admin.*, 246 P.2d 591 (Utah 1952); *Ellis v. Utah State Retirement Board*, 757 P.2d 882 (Utah Ct. App. 1988). One of the conditions of vesting under Utah Code Ann. § 67-19-14.2 is that the employee must actually retire.
3. Under the express language of Utah Code Ann. § 67-19-14.2(1)(B)(2) and Utah Admin. Code r. 477-7-6 (2005), plaintiffs' ability, or the ability of any State employee, to use accumulated sick leave to purchase retiree medical and life insurance benefits at the 8-hours-for-1-month ratio does not vest unless and until a State employee qualifies for and in fact retires from employment with the State of Utah and, at that time, elects to participate in the Program. Because the ability to purchase such medical and life insurance benefits does not vest until retirement, a public employee does not have a contractual right to those benefits prior to retirement. Because they have not retired, and therefore do not have any vested, contractual right to the pre-HB 213 benefits they now claim, plaintiffs cannot state a claim for breach of contract against the State.<sup>4</sup>

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<sup>4</sup> Roe Plaintiff 3 has, in fact, retired, having done so in or about August 2005.

4. The terms of the Program are statutory. While State agencies may elect, on a year-to-year basis, whether to participate in the Unused Sick Leave Retirement Option Program, as set forth in section 67-19-14.2 and Utah Admin. Code r. 477-7-6, State agencies offer only those benefits specifically set forth in the statute and therefore have not voluntarily undertaken any obligation beyond the express statutory terms. Because the State agencies have not undertaken any obligation to provide any benefits except those specifically set forth in the statute, plaintiffs cannot state a claim for breach of contract against the State of Utah.

5. No contract exists between the State and its current employees, including plaintiffs, arising from the Unused Sick Leave Retirement Option Program.

#### Ripeness and Standing

6. To the extent plaintiffs seek monetary damages arising from their claim for an unconstitutional taking, as set forth in the Amended Complaint, their claim is not ripe because none of the plaintiffs has retired.

7. The Utah Public Employees Association does not have associational standing because HB 213 does not have the same effect on all public employees represented by the Utah Public Employees Association. Further, any damage assessment must be tailored to the needs of each individual member of the Association, taking into consideration facts and circumstances unique to that individual.

8. To the extent the individual plaintiffs seek injunctive relief, and not monetary damages, based on a facial challenge contending that HB 213 necessarily causes an unconstitutional taking, the claim is ripe.

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## Unconstitutional Taking

9. Under Utah Code Ann. § 67-19-14.2 and Utah Admin. Code r. 477-7-6, plaintiffs' ability to use accumulated sick leave to purchase retiree medical and life insurance benefits at the 8-hours-for-1-month ratio does not vest unless and until plaintiffs, or any State employee, qualifies for and in fact retires from State employment and at that time elects to participate in the Program. Because plaintiffs have not retired, and their ability to purchase such retiree medical and life insurance benefits therefore has not vested, plaintiffs do not have a property interest that may be subject to a claim of an unconstitutional taking.

10. An individual employee's right to decide when to retire is not a property right and therefore is not subject to a claim for an unconstitutional taking.

11. The option to cash out unused sick leave at retirement is not a property right and therefore is not subject to a claim for an unconstitutional taking.

12. Plaintiffs' facial challenge to HB 213 fails because plaintiffs must show that HB 213 is incapable of any valid application. Because HB 213 will affect State employees differently, depending on individual facts, circumstances, and preferences, and may act to the benefit of some State employees, plaintiffs cannot establish that no set of circumstances exist under which HB 213 would be valid.

13. HB 213 does not effect an unconstitutional taking of the property of State employees, including plaintiffs.



## Estoppel

14. Plaintiffs cannot state a claim of estoppel against the State because they cannot show that HB 213 will result in such an injustice or injury that the State should be powerless to change its own laws. Because plaintiffs make a facial challenge to HB 213, such an injustice or injury must be a necessary result in every possible application of HB 213. Because the facial challenge fails as a matter of law, plaintiffs cannot satisfy the injustice requirement necessary to assert estoppel against the State.

15. Plaintiffs' motion for a preliminary injunction under its estoppel claim fails because they do not have a substantial likelihood of success on the merits. While the factual allegations of the Complaint appear to satisfy the first three elements required to assert an estoppel claim, they fail to satisfy the last two required elements. Because plaintiffs assert a facial challenge, they must show that an injustice results in every possible application of HB 213 and that there is no substantial adverse effect on the public interest.

16. Plaintiffs fail to state a claim of estoppel against the State because they have failed to show that an injustice results in every possible application of HB 213.

17. In addition, plaintiffs fail to state a claim of estoppel against the State because it is clear through the evidence presented that there is a substantial adverse impact on the public interest.

18. Finally, plaintiffs cannot assert a claim of estoppel against the State because controlling Utah law generally prevents the use of estoppel to bind governmental entities to future promises of public employee compensation.

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Issuance of Preliminary Injunction

19. Based on the findings and conclusions set forth above, plaintiffs have not met the standards necessary to justify the issuance of a preliminary injunction because:

(a) The application of HB 213 depends on numerous fact-specific questions, the harm claimed by plaintiffs is too speculative, and it appears from the evidence that any harm can be compensated;

(b) Enjoining HB 213 would be adverse to the public interest; and/or

(c) Plaintiffs cannot show that there is a substantial likelihood that they will prevail on the merits.

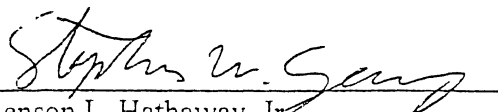
ENTERED this \_\_\_\_ day of December, 2005.

BY THE COURT:

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William W. Barrett  
District Court Judge

APPROVED AS TO FORM:

  
Benson L. Hathaway, Jr.  
Stephen W. Geary  
Attorneys for Plaintiff

00017

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of December, 2005, I caused to be served a copy of the foregoing Findings of Fact and Conclusions of Law by hand-delivering a true and correct copy thereof to counsel for plaintiffs at the following address:

Benson L. Hathaway, Jr.  
Stephen W. Geary  
Kirton & McConkie  
60 East South Temple, #1800  
P.O. Box 45120  
Salt Lake City, UT 84145-0120

DATED this 19th day of December, 2005.

A handwritten signature in cursive script, reading "Audi E. L. Zeithero", followed by a horizontal line.

00018

Clark Waddoups (3957)  
Heidi E. C. Leithead (5102)  
David C. Reymann (8495)  
PARR WADDOUPS BROWN GEE & LOVELESS  
185 South State Street, Suite 1300  
Salt Lake City, UT 84111  
Telephone: 801/532-7840  
Telefax: 801/532-7750

Thomas R. Lee (5991)  
524 JRCB, Brigham Young University  
Provo, UT 84602-8000  
Telephone: 801-422-9024

Attorneys for State of Utah

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

---

UTAH PUBLIC EMPLOYEES	)	
ASSOCIATION and ROES 1 through 5,	)	ORDER
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	Civil No. 050911548 mi
STATE OF UTAH,	)	
	)	Judge William W. Barrett
Defendant.	)	
	)	

---

Pending before the Court is a motion for preliminary injunction filed by plaintiff Utah Public Employees Association and Roes 1 through 5 ("plaintiffs") and a motion for judgment on the pleadings filed by defendant State of Utah with respect to each of the three counts set forth in

the Amended Complaint. The Court heard evidence regarding plaintiffs' motion for preliminary injunction and heard arguments from counsel regarding both the motion for preliminary injunction and the motion for judgment on the pleadings. The Court thereafter entered findings of fact and conclusions of law. Based on those findings and conclusions,

IT IS HEREBY ORDERED as follows:

1. Defendant's motion for judgment on the pleadings is granted in its entirety.
2. Plaintiffs' motion for preliminary injunction is denied.

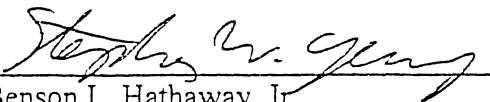
ENTERED this \_\_\_\_ day of December, 2005.

BY THE COURT:

---

William W. Barrett  
District Court Judge

APPROVED AS TO FORM:

  
Benson L. Hathaway, Jr.  
Stephen W. Geary  
Kirton & McConkie  
Attorneys for Plaintiffs

00020

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of December, 2005, I caused to be served a copy of the foregoing Order by hand-delivering a true and correct copy thereof to counsel for plaintiffs at the following address:

Benson L. Hathaway, Jr.  
Stephen W. Geary  
Kirton & McConkie  
60 East South Temple, #1800  
P.O. Box 45120  
Salt Lake City, UT 84145-0120

DATED this 19th day of December, 2005.

A handwritten signature in cursive script, reading "Judi L. Luthread", followed by a horizontal line.

IN THE UTAH SUPREME COURT

FILED  
UTAH APPELLATE COURTS

-----oo00o-----

RECEIVED

DEC 14 2005

DEC 19 2005

Utah Public Employees  
Association and Roes 1-5,

Plaintiffs and Petitioners, <sup>KIRTON & McCONKIE</sup>

v.

Case No. 20051121-SC  
050911548

State of Utah,

Defendant and Respondent.

**ORDER GRANTING EMERGENCY RELIEF**

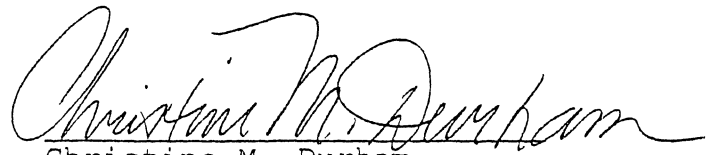
Utah Public Employees Association and Roes 1-5 have filed a Petition for Emergency Relief in the form of an injunction delaying the implementation of House Bill 213 ( Unused Sick Leave at Retirement Amendments ) until this court has had an opportunity to review the merits of a decision by the trial court in this case. Absent intervention by the court, the issues in this case will become moot as to all petitioners who must retire by December 16, 2005 to receive the benefits of the current Unused Sick Leave Retirement Option Program. Injunctive relief is therefore necessary to preserve this court's jurisdiction to review the merits of this case.

IT IS HEREBY ORDERED that implementation of House Bill 213 insofar as it amends Utah Code § 67-19-14.2 is enjoined until final disposition of the appeal in this case. If the plaintiffs/petitioners do not prevail on the merits, the injunction will remain in place for at least 30 days after the issuance of this court's final disposition to permit the implementation of retirement options by eligible parties.

By the Court \*

Dated

December 14, 2005

  
Christine M. Durham  
Chief Justice

\* Justice Matthew Durrant has recused himself in this matter and takes no part in the decision.

CERTIFICATE OF MAILING

I hereby certify that on December 14, 2005, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:


BENSON L. HATHAWAY  
ALEXANDER DUSHKU  
MATTHEW K. RICHARDS  
STEPHEN W GEARY  
KIRTON & MCCONKIE  
60 E S TEMPLE #1800  
PO BOX 45120  
SALT LAKE CITY UT 84145-0120

CLARK WADDOUPS  
HEIDI E. LEITHEAD  
DAVID C REYMANN  
PARR WADDOUPS BROWN GEE & LOVELESS  
185 S STATE STE 1300  
PO BOX 11019  
SALT LAKE CITY UT 84111

and a true and correct copy of the foregoing ORDER was deposited in the United States mail to the trial court listed below:

THIRD DISTRICT, SALT LAKE  
ATTN: SOPHIE ORVIN / JODI BAILEY  
450 S STATE ST  
PO BOX 1860  
SALT LAKE CITY UT 84114-1860

Dated this December 14, 2005.

By   
Deputy Clerk

Case No. 20051121  
THIRD DISTRICT, SALT LAKE, 050911548



IN THE UTAH SUPREME COURT  
-----oo0oo-----

FILED  
UTAH APPELLATE COURTS

DEC 14 2005

Utah Public Employees  
Association and Roes 1-5,

Plaintiffs and Petitioners,

v.

Case No. 20051121-SC  
050911548

State of Utah,

Defendant and Respondent.

ORDER

Having reviewed the written submissions and oral argument of the parties, the court denies the motion to vacate the Order Granting Emergency Relief and establishes the following schedule for final disposition of the underlying case:

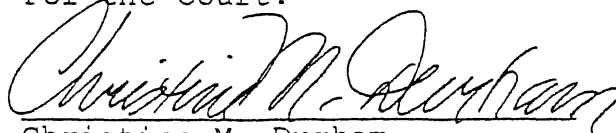
1. Plaintiff, Utah Public Employees Association and Roes 1-5 are instructed to perfect their appeal and file opening briefs with the court on or before December 29, 2005.
2. Defendant State of Utah will file a responsive appellate brief by January 5, 2006.
3. Plaintiffs will have until January 9, 2006 to file a reply brief.
4. The Court will hear oral argument in this matter at 2:00 pm on Tuesday, January 10, 2006.

The Court has been fully advised of the needs of the parties for a resolution of the issues in this case within limited time-frames, and will make every appropriate effort to decide it expeditiously.

For the Court:\*

Dated

December 14, 2005

  
Christine M. Durham  
Chief Justice

\* Justice Matthew Durrant is recused in this matter and Judge Pamela Greenwood of the Utah Court of Appeals has been assigned to the panel.

CERTIFICATE OF MAILING

I hereby certify that on December 20, 2005, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:


BENSON L. HATHAWAY  
ALEXANDER DUSHKU  
MATTHEW K. RICHARDS  
STEPHEN W GEARY  
KIRTON & MCCONKIE  
60 E S TEMPLE #1800  
PO BOX 45120  
SALT LAKE CITY UT 84145-0120

CLARK WADDOUPS  
HEIDI E. LEITHEAD  
DAVID C REYMANN  
PARR WADDOUPS BROWN GEE & LOVELESS  
185 S STATE STE 1300  
PO BOX 11019  
SALT LAKE CITY UT 84111

and a true and correct copy of the foregoing ORDER was deposited in the United States mail to the trial court listed below:

THIRD DISTRICT, SALT LAKE  
ATTN: SOPHIE ORVIN / JODI BAILEY  
450 S STATE ST  
PO BOX 1860  
SALT LAKE CITY UT 84114-1860

Dated this December 20, 2005.

By   
Deputy Clerk

Case No. 20051121  
THIRD DISTRICT, SALT LAKE, 050911548

BENSON L. HATHAWAY, JR. (Bar No. 4219)  
STEPHEN W. GEARY (Bar No. 9635)  
**KIRTON & McCONKIE**  
60 East South Temple, #1800  
P.O. Box 45120  
Salt Lake City, Utah 84145-0120  
Telephone: (801) 328-3600

Attorneys for Plaintiffs

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

---

UTAH PUBLIC EMPLOYEES  
ASSOCIATION and ROES 1 through 5,  
  
Plaintiffs,

v.

STATE OF UTAH,  
  
Defendant.

COMPLAINT

Civil No. 050911548 MI

Judge: Barnett

---

Plaintiffs the Utah Public Employees Association and Roes 1 through 5 complain and allege against Defendant State of Utah as follows:

INTRODUCTION

1. This Complaint challenges the enactment of House Bill 213, Unused Sick Leave at Retirement Amendments, passed by the 2005 Legislature, which will take effect January 1, 2006, absent injunctive relief from the Court. HB 213 works a dramatic revision to the

retirement benefits of State employees, significantly changing how employees are compensated for their unused sick leave upon retirement. Roes 1 through 5, as well as thousands of other State employees represented by the Utah Public Employees Association, have foregone substantially better employment opportunities in the local government and the private sector, in reliance upon the treatment of their unused sick leave as voluntarily adopted by the various State agencies and departments employing them. They have further foregone the use of their sick leave for personal and family needs in reliance thereon. Having induced Plaintiffs' reliance, the State of Utah now seeks to change the rules, to Plaintiffs' substantial detriment via HB 213. Plaintiffs bring this lawsuit to enjoin the effect of HB 213 and require the State of Utah to fulfill its promises to them.

#### **PARTIES**

2. Utah Public Employees Association (UPEA) is a Utah non-profit corporation and a union representing several thousand employees of the State of Utah.

3. The State of Utah is the named Defendant.

4. Roes 1 through 5 are current employees of several different State agencies and departments who will be adversely affected by HB 213. Because of the prospect of retaliatory actions by the State, these plaintiffs sue under a pseudonym.

#### **JURISDICTION & VENUE**

5. This Court has jurisdiction over the present matter pursuant to Utah Code § 78-3-4(1).

6. Plaintiffs' causes of action include breach of contract and are against the State of Utah, which is present in Salt Lake County, Utah. Therefore, venue is proper in this Court pursuant to Utah Code § 78-13-4 and Utah Code § 78-13-7.

### GENERAL ALLEGATIONS

7. State employees are notoriously underpaid in comparison both to the private sector and to city and county employees. For example, more than half of all State employees earn less than \$32,000 annually, while the median Utah income according to the most recent information from the U.S. Census Bureau is over \$49,000.

8. Over the past decade, salaries for county and city employees in Utah's five most populous counties have dramatically outpaced salaries for State employees. While salaries for county employees in three such counties have risen 50% or more during that period, State employee salaries have risen barely 23%.

9. By some estimates, State employee salaries are at least 17% below market, and historically, more than 70% of State employees have been paid at below-market rates.

10. Further adding to their burdens, State employees have seen large increases in their work load in recent years due to budget cuts and layoffs. Although their workloads have increased significantly, State employees' pay raises, when there have been any, have been very meager.

11. Historically, the State of Utah has compensated for below-market wages by providing a comparatively generous benefits package.

12. Also, employee absences cause the State of Utah, like any employer, substantial losses, both financial and intangible. In addition to the salary cost of the absent employee, there

is the lost productivity of the work or services that employee would be performing, or the expense of overtime for other employees, or temporary employees, to provide that work or service. Other employees, compelled to perform an absentee's work as well as their own, suffer from decreased morale, lower productivity, and increased burn out. According to a 2004 study conducted by an independent institute, the lost productivity costs of employee absences are four times the costs of health benefits for employees. In other words, employers such as the State of Utah are much better served by providing strong benefits and incentives to reduce employee absences than they are by scrimping on such benefits and suffering the costs of absences.

13. As part of a practice of providing good benefits, as well as to discourage employee absences, in the early 1980s, the Utah Legislature enacted special provisions for compensating employees for unused sick leave, called the Unused Sick Leave Retirement Option Program (the "Program"), allowing such unused time to be converted to annual leave or even to post-retirement health and medical insurance.

14. Prior to the effects of HB 213, the Program allowed all State agencies to offer the following benefits to their employees upon retirement:

- a. Each employee would receive continuing medical and life insurance benefits for up to five years or until age 65, which ever occurred first;
- b. Each employee could receive up to 25% of his or her unused accumulated sick leave, at the employee's rate of pay at the time of retirement, either as a cash payment or as an employer contribution to a 401(k) plan or similar retirement plan;

- c. Any remaining unused sick leave not taken as a pay out or retirement plan contribution, less a 480-hour reduction, could be used to purchase additional medical and life insurance coverage (including Medicare supplemental insurance after age 65), for the employee and/or spouse at the rate of one month of coverage for every eight hours (i.e., one work day) of unused sick leave.

15. All or substantially all State agencies affirmatively decided to offer the Program to their employees, relying on it as an essential tool in their on-going struggle to recruit new employees and retain current employees.

16. Roes 1 through 5 and UPEA's other members accepted or continued their employment with the State of Utah in reliance upon the continuation of the Program, foregoing better salaries they could have readily obtained in private or local government employment.

17. Roes 1 through 5 and UPEA's other members further have made personal and family sacrifices to attend to their employment without using all of their available sick leave, so as to accumulate unused sick leave to use for these allowed purposes upon retirement.

18. HB 213, passed by the 2005 Legislature, works dramatic and deleterious changes to the Program.

19. For all unused sick leave accumulated prior to January 1, 2006, including unused sick leave accumulated prior to the passage of HB 213, the bill makes the following changes:

- a. The right to receive continuing medical and life insurance benefits for up to five years will be phased out a year at a time over the next five years, so that employees retiring in 2006 will receive five years of coverage; those retiring

in 2007 will receive only four years of coverage; and those retiring in 2011 or later will receive no automatic coverage at all; this change is partially offset by a corresponding five-year phase-out of the automatic 480-hour reduction in accumulated sick leave available to purchase additional coverage, which is decreased by 96 hours each year;

- b. Employees no longer have the option of receiving any cash payment for unused sick leave; and,
- c. Employees no longer have any discretion as to how much, if any, of their 25% of unused sick leave they want to contribute to their retirement plan contribution or reserve for the purchase of continuing medical and insurance benefits at the favorable rate of 8 hours of unused sick leave for one month of post-retirement medical and insurance benefits; instead 25% of their unused accumulated sick leave is automatically converted into an employer contribution to their 401(k) plan.

20. For unused sick leave accumulated on and after January 1, 2006, HB 213 makes the following changes:

- a. Upon retirement, 25% of such unused accumulated sick leave is automatically converted into an employer contribution to their 401(k) plan; and
- b. The remaining accumulated sick leave will be converted to a dollar value and placed into a health care reimbursement program to pay for health-related costs.



21. The Office of the Legislative Fiscal Analyst specifically noted that, under HB 213, "Current employees who have not used their sick leave in anticipation of using it to purchase health insurance upon retirement would experience a decrease in the value of those hours and would not be able to purchase coverage for as long as they otherwise would be eligible for." HB 213 has a harmful effect upon essentially all of UPEA's members and Roes 1 through 5.

22. Roe 1 is 62 years old and has worked for the State for over 30 years, in which time Roe 1 has accumulated over 1,800 hours of unused sick leave. Roe 1 had planned to retire in 2006, but due to HB 213's reduction in retirement benefits, Roe 1 now expects to retire before HB 213 becomes effective. If Roe 1 retires in January 2006 (after HB 213 becomes effective) as opposed to December 2005 (before HB 213 becomes effective), Roe 1 will lose nearly 5 years of health insurance coverage due to HB 213's reduction in the amount of health insurance coverage that Roe 1 can purchase with the unused sick leave hours that Roe 1 has currently accumulated. The 401(k) contribution that Roe 1 would be forced to receive under HB 213 would only partially compensate Roe 1 for this dramatic reduction in health insurance coverage.

23. Roe 2 is 58 years old and has worked for the State for over 30 years, in which time Roe 2 has accumulated over 2,000 hours of unused sick leave. Roe 2 is not financially prepared to retire at this time, and had planned to continue working another two or three years, but now believes it will be necessary to retire this year to avoid the costs of HB 213. Under the pre-HB 213 terms of the Program, if Roe 2 retired in 2007 at the age of 60, Roe 2 would have health insurance coverage until reaching the age 80 years and 10 months. If HB 213 becomes effective, and Roe 2 retires in 2007 at the age of 60, Roe 2 will only have health insurance

coverage until reaching the age of 75 years and 7 months, a difference of over 5 years in the amount of health insurance coverage that Roe 2 could purchase with the unused sick leave hours that Roe 2 has currently accumulated. Once again, the 401(k) contribution that Roe 2 would be forced to receive under HB 213 would only partially compensate Roe 2 for the cost of losing over five years of health insurance coverage.

24. Roe 3 is 45 years old and has worked for the State for almost 20 years, in which time Roe 3 has accumulated over 2,100 hours of unused sick leave. Roe 3, a single parent with health problems and two children, at great sacrifice to both Roe 3 and Roe 3's family, has used as little sick leave time as possible so that such time could be used to purchase continued health insurance coverage after Roe 3 retires. If Roe 3 retires in 2008 as currently planned, the amount of health insurance coverage that Roe 3 will be able to purchase with the sick leave that Roe 3 has accumulated prior to the enactment of HB 213 will be reduced by nearly 5½ years due to HB 213's affect upon the Program. Again, the forced 401(k) contribution would only partially compensate Roe 3 for this reduction in retirement benefits.

25. Roe 4 is 51 years old and has worked for the State for over 20 years, in which Roe 4 has accumulated over 1,500 hours of unused sick leave. Roe 4 plans to work until 2014 before retiring. Under the pre-HB 213 terms of the Program, Roe 4 would have been able to continue accumulating unused sick leave that could be used to purchase continued health insurance coverage. At Roe 4's current accumulation rate, Roe 4 expects to have accumulated approximately 2,200 hours of unused sick leave when Roe 4 retires in 2014. Under the pre-HB 213 terms of the Program, Roe 4 would have been able to use that unused sick leave to purchase health insurance coverage up to the age of 83. If HB 213 becomes effective, and Roe 4 retires in

2014, Roe will only be able to purchase health insurance coverage up to the age of 77, a difference of 6 years. The forced 401(k) contribution, and ability to use the value of unused sick leave accumulated after 2005 in a health reimbursement account, only partially compensates Roe 4 for this reduction in benefits.

26. Roe 5 is 40 years old and has worked for the State for 14 years, in which time Roe 3 has accumulated over 700 hours of unused sick leave, despite having to undergo a recent major operation. Roe 5 has declined numerous employment offers with private employers offering higher salaries specifically relying upon the health insurance benefits supplied by State employment prior to the enactment of HB 213.

27. Roes 1 through 5 are not unique. There are thousands of UPEA members in similar situations. Collectively, these loyal employees have devoted thousands of years of service to the State of Utah, its residents and visitors. In their service, they have foregone hundreds of thousands of hours – or tens of thousands of work days – of available sick leave. While a desire to serve the State, its residents and visitors in an efficient and effective manner has been one motive for this sacrifice, the desire to be able to use those unused sick leave hours as promised upon retirement has also been a major motive for this sacrifice. If HB 213 becomes effective, the amount of health insurance coverage that these employees will be able to purchase with their currently accumulated unused sick leave coverage will be reduced by thousands of years, at a cost of untold millions to the employees. HB 213 deprives these employees of the fruits of their sacrifice, and breaks the many promises that the State and its agencies have made to these employees over the years.

28. Ironically, while the Legislature was advised by the Office of the Legislative Fiscal Analyst that HB 213 “will result in significantly lower personnel costs to the State,” in fact the opposite may be true. In reaching that conclusion, the Fiscal Analyst considered only a comparison of the replacement wage cost of eight hours of sick leave with the anticipated cost of one month of health coverage. That admittedly-simplistic analysis ignores a number of significant considerations: (i) that the total lost-productivity cost of an employee absence is typically *seven times* the replacement wage cost; (ii) the lost-productivity cost is incurred immediately, while the cost of additional health care coverage is not incurred until after an employee’s retirement, years, or even decades, in the future; (iii) the substantial decrease in the benefit for foregoing the use of sick leave will undoubtedly discourage employees from sacrificing that time and lead to a greater incidence of employees absent on sick leave; (iv) to compensate for these increased absences, the anticipated cost of future, post-retirement health care coverage supposedly “saved” by HB 213 would have to be many, many times the present lost-wage cost of an employee absence; all of this in addition to (v) the increased number of retirements of the most skilled and difficult-to-replace employees; (vi) the cost of training new employees; and (vii) the decreased efficiency of newer employees.

#### **FIRST CAUSE OF ACTION**

##### **(Breach of Contract – Specific Performance)**

29. Plaintiffs incorporate herein by reference paragraphs 1 through 34, above.

30. Utah’s various agencies and departments employing Roes 1 through 5 and UPEA’s members voluntarily opted in to the Unused Sick Leave Retirement Option Program.

31. Under Utah law, those terms of employment that are not required by statute but instead are voluntarily adopted by the government constitute a contract between the government and its employee(s).

32. Specifically, under the Unused Sick Leave Retirement Option Program, Roes 1 through 5 and UPEA's members have the contractual rights:

- a. To continue receiving medical and life insurance benefits for up to five years or until age 65, which ever occurs first;
- b. To receive up to 25% of unused accumulated sick leave either as a cash payment or as an employer contribution to a 401(k) plan or similar retirement plan; and
- c. To take any remaining unused sick leave not taken as a pay out or retirement plan contribution, and minus an additional 480 hours, to purchase additional medical and life insurance coverage at the rate of one month of coverage for every eight hours of unused sick leave.

33. Roes 1 through 5 and UPEA's members have fulfilled all their obligations under this contract, except any obligations that have been waived, prevented, or excused by the State of Utah.

34. The State of Utah has breached its contract with Roes 1 through 5 and UPEA's members by reducing and ultimately eliminating automatic medical and life insurance benefits after retirement, denying employees the opportunity to receive up to 25% of unused accumulated sick leave as a cash payment, denying employees the opportunity to forego a 401(k) plan contribution so as to have additional unused sick leave hours to apply toward the purchase of

additional medical benefits, and denying employees the opportunity to purchase additional health insurance after retirement at the rate of one month of coverage for every eight hours of unused sick leave.

35. Because of the varying and unpredictable costs of health care coverage in the future, when the individual employees retire, an award of money damages cannot make Roes 1 through 5 or UPEA's members whole from the State's breach of contract. The only adequate judicial remedy is an order requiring the State to specifically perform its obligations under the Unused Sick Leave Retirement Option Program.

## SECOND CAUSE OF ACTION

### (Estoppel)

36. Plaintiffs incorporate herein by reference paragraphs 1 through 41, above.

37. Through their voluntary adoption of the Unused Sick Leave Retirement Option Program, the State of Utah's various agencies and departments employing Roes 1 through 5 and UPEA's members represented that their employees would have the right:

- a. To continue receiving medical and life insurance benefits for up to five years or until age 65, whichever occurs first;
- b. To receive up to 25% of unused accumulated sick leave either as a cash payment or as an employer contribution to a 401(k) plan or similar retirement plan; and
- c. To take any remaining unused sick leave not taken as a pay out or retirement plan contribution, and minus an additional 480 hours, to purchase additional

medical and life insurance coverage at the rate of one month of coverage for every eight hours of unused sick leave.

38. The State of Utah and its various agencies and departments intended by the foregoing representations to induce Roes 1 through 5 and UPEA's members to forego more profitable employment with other employers and to forego the use of substantial portions of their sick leave.

39. Roes 1 through 5 and UPEA's members detrimentally relied upon the foregoing representations by foregoing more profitable employment with other employers and foregoing the use of substantial portions of their sick leave, to the significant benefit of the State of Utah its various agencies and departments, and its residents and visitors.

40. With the passage of HB 213, the State of Utah now seeks to deny Roes 1 through 5 and UPEA's members the benefits specifically represented to them in the Unused Sick Leave Retirement Option Program.

41. Denying Roes 1 through 5 and UPEA's members the benefits specifically represented to them in the Unused Sick Leave Retirement Option Program works a substantial injustice upon these Plaintiffs.

42. Because of the varying and unpredictable costs of health care coverage in the future, when the individual employees retire, an award of money damages cannot make Roes 1 through 5 or UPEA's members whole from the State's breach of contract. The only adequate judicial remedy is an order enjoining the application of HB 213 and requiring the State of Utah to continue to perform its obligations under the Unused Sick Leave Retirement Option Program.

### THIRD CAUSE OF ACTION

#### (Takings)

43. Plaintiffs incorporate herein by reference paragraphs 1 through 48, above.

44. Utah's various agencies and departments employing Roes 1 through 5 and UPEA's members voluntarily opted in to the Unused Sick Leave Retirement Option Program.

45. Under Utah law, those terms of employment that are not required by statute but instead are voluntarily adopted by the government constitute a contract between the government and its employee(s).

46. Specifically, under the Unused Sick Leave Retirement Option Program, Roes 1 through 5 and UPEA's members have the contractual rights:

- a. To continue receiving medical and life insurance benefits for up to five years or until age 65, whichever occurs first;
- b. To elect how much, if any, of the first 25% of unused accumulated sick leave they want to receive either as a cash payment or as an employer contribution to a 401(k) plan or similar retirement plan; and
- c. To take any remaining unused sick leave not taken as a pay out or retirement plan contribution, and minus an additional 480 hours, to purchase additional medical and life insurance coverage at the rate of one month of coverage for every eight hours of unused sick leave.

47. Roes 1 through 5 and UPEA's members have fulfilled all their obligations under this contract, except any obligations that have been waived, prevented, or excused by the State of Utah, and their rights have therefore vested and constitute their personal property.



48. The State of Utah has taken the personal property of Roes 1 through 5 and UPEA's members by reducing and ultimately eliminating automatic medical and life insurance benefits after retirement, denying employees the opportunity to receive up to 25% of unused accumulated sick leave as a cash payment, denying employees the opportunity to forego a 401(k) plan contribution so as to have additional unused sick leave hours to apply toward the purchase of additional medical benefits, and denying employees the opportunity to purchase additional health insurance after retirement at the rate of one month of coverage for every eight hours of unused sick leave.

49. Roes 1 through 5 and UPEA's members are entitled to compensation for the taking of their vested contractual rights, in an amount to be determined at trial.

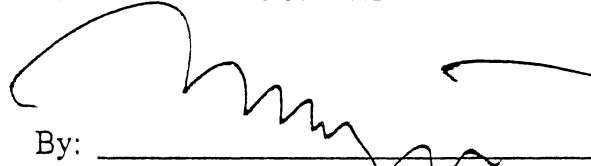
#### **DEMAND FOR RELIEF**

WHEREFORE, Plaintiffs relief as follows:

1. Under the First Cause of Action, entry of judgment in favor of Plaintiffs and against the State of Utah and requiring Defendant's specific performance of the Unused Sick Leave Retirement Option Program as it existed prior to amendment by HB 213.
2. Under the Second Cause of Action, entry of judgment in favor of Plaintiffs and against the State of Utah and a preliminary and permanent injunction against the application of HB 213.
3. Under the Third Cause of Action, entry of judgment in favor of Plaintiffs and against the State of Utah and damages in an amount to be determined at trial.
4. For Plaintiffs' attorneys' fees and costs to the extent permitted by law; and
5. For such further relief as the Court may deem appropriate.

DATED this 29 day of June, 2005.

KIRTON & McCONKIE

  
By: \_\_\_\_\_  
BENSON L. HATHAWAY, JR.  
STEPHEN W. GEARY  
Attorneys for Plaintiffs

Plaintiff's address:

1000 W. Bellwood Lane  
Murray, Utah 84107

BENSON L. HATHAWAY, JR. (Bar No. 4219)  
STEPHEN W. GEARY (Bar No. 9635)  
**KIRTON & McCONKIE**  
60 East South Temple, #1800  
P.O. Box 45120  
Salt Lake City, Utah 84145-0120  
Telephone: (801) 328-3600

Attorneys for Plaintiffs

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

---

UTAH PUBLIC EMPLOYEES	:	
ASSOCIATION and ROES 1 through 5,	:	MOTION FOR PRELIMINARY
	:	INJUNCTION
Plaintiffs,	:	
	:	
v.	:	Civil No. 050911548 mi
	:	
STATE OF UTAH,	:	Judge William W. Barrett
	:	
Defendant.	:	
	:	

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Plaintiffs Utah Public Employees Association and Roes 1 through 5, by and through counsel undersigned, and pursuant to Utah Rule of Civil Procedure 65A, hereby move the Court for a preliminary injunction enjoining the effective date of House Bill 213, Unused Sick Leave at Retirement Amendments until the conclusion of this litigation.

The grounds for this Motion are that (1) UPEA’s members and Roes 1 through 5 are State employees who have accumulated substantial amounts of unused sick leave hours in reliance upon Utah’s Unused Sick Leave Retirement Option Program; (2) HB 213 irreparably harms the Roe Plaintiffs and UPEA’s members by dramatically impairing the value of their accumulated

unused sick leave; many of the Roe Plaintiffs and UPEA members will be forced to surrender their employment and retire to avoid the effects of HB 213, if it is not enjoined; (3) the threatened injury to the Roe Plaintiffs and UPEA members outweighs any harm an injunction may cause to the State, as once HB 213 takes effect, it will actually cause a short-term increase in costs to the State; and (4) Plaintiffs' litigation presents serious issues on the merits, on which Plaintiffs are likely to prevail.

This Motion is supported by the accompanying Memorandum and the affidavits, declarations and other exhibits attached thereto. Notice of this Motion is being served upon Defendant.

DATED this 15 day of September, 2005.

KIRTON & McCONKIE

By: Stephen W. Geary  
BENSON L. HATHAWAY, JR.  
STEPHEN W. GEARY  
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 15<sup>th</sup> day of September, 2005, I caused to be delivered by the method indicated below a true and correct copy of the **MOTION FOR PRELIMINARY INJUNCTION**, to the following:

<u>      </u>	FEDERAL EXPRESS	Clark Waddoups
<u>      </u>	U.S. MAIL	Heidi E.C. Leithead
<u>  X  </u>	HAND DELIVERY	David C. Reymann
<u>      </u>	FAX TRANSMISSION	Cheylynn Hayman
		PARR WADDOUPS BROWN GEE & LOVELESS 185 South State Street, Suite 1300 Salt Lake City, UT 84111

<u>      </u>	FEDERAL EXPRESS	Thomas R. Lee
<u>  X  </u>	U.S. MAIL	524 JRCB
<u>      </u>	HAND DELIVERY	Brigham Young University
<u>      </u>	FAX TRANSMISSION	Provo, UT 84602-8000

Carole Hymas

BENSON L. HATHAWAY, JR. (Bar No. 4219)  
STEPHEN W. GEARY (Bar No. 9635)  
**KIRTON & McCONKIE**  
60 East South Temple, #1800  
P.O. Box 45120  
Salt Lake City, Utah 84145-0120  
Telephone: (801) 328-3600

Attorneys for Plaintiffs

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

---

UTAH PUBLIC EMPLOYEES	:	
ASSOCIATION and ROES 1 through 5,	:	<b>AFFIDAVIT OF TERRY YOCKEY</b>
	:	
Plaintiffs,	:	
	:	Civil No. 050911548 mi
v.	:	
	:	Judge William W. Barrett
STATE OF UTAH.	:	
	:	
Defendant.	:	
	:	

---

STATE OF UTAH            )  
                                  : ss.  
COUNTY OF SALT LAKE )

I, Terry Yockey, being first duly sworn, depose and state as follows:

1. I am the individual identified in the Amended Complaint in this matter as Roe 1. I started working for the State on July 1, 1971. I have worked for the Department Human Services' Division of Children and Family Services for over 34 years.

2. The Department of Human Services has participated in the Unused Sick Leave Retirement Option Program (the "Program") since that program came into existence. The

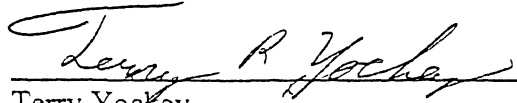
Program allows me to purchase post-retirement health insurance using my unused sick leave hours.

3. I originally planned to retire in April 2006. However, since the passage of HB 213, I have been planning to retire in December, unless something is done to stop HB 213 from becoming effective January 1, 2006. I have over 1,900 unused and accumulated sick leave hours, and cannot afford to have HB 213 prevent me from converting all of those hours into health insurance coverage.

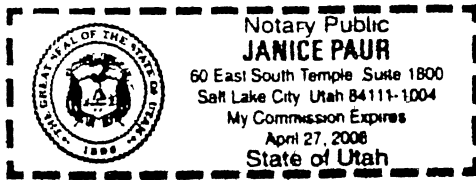
4. If I retire this coming December, I will have nearly 20 years of health insurance coverage. If I work an additional four months and retire in April 2006, as I had originally planned, I will have less than 15 years of health insurance coverage due to the effects of HB 213. I simply cannot afford to lose nearly 5 years of health insurance coverage. Both my wife and I are on expensive medications. Our co-payments alone for prescriptions are \$600-700 a month. I do not know how we would get by without the post-retirement health insurance I earned through my years of service by avoiding the use of my sick leave.

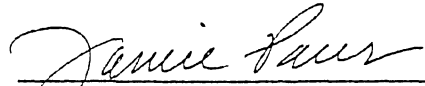
5. There have obviously been many years during my 34 years with the State when we did not receive raises, or the raises we did receive were very small. I was willing to accept this because I felt that I had good insurance coverage, which made up for the lack of pay raises. Now, with HB 213, the only way that I can prevent the State from retroactively taking away a significant portion of that insurance coverage, to preserve all of the health insurance that I have earned, is to retire early. Thus, I will retire before the year ends unless something is done to prevent HB 213 from becoming effective as currently scheduled.

DATED this 14 day of September, 2005.

  
Terry Yockey

Subscribed and sworn to before me this 14<sup>th</sup> day of September, 2005.



  
Notary Public

00047



BENSON L. HATHAWAY, JR. (Bar No. 4219)  
STEPHEN W. GEARY (Bar No. 9635)  
**KIRTON & McCONKIE**  
60 East South Temple, #1800  
P.O. Box 45120  
Salt Lake City, Utah 84145-0120  
Telephone: (801) 328-3600

Attorneys for Plaintiffs

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

---

UTAH PUBLIC EMPLOYEES	:	
ASSOCIATION and ROES 1 through 5,	:	<b>AFFIDAVIT OF ROBERT H.</b>
	:	<b>ANDERSON</b>
Plaintiffs,	:	
	:	
v.	:	Civil No. 050911548 mi
	:	
STATE OF UTAH,	:	Judge William W. Barrett
	:	
Defendant.	:	
	:	

---

STATE OF UTAH            )  
                                  : ss.  
COUNTY OF SALT LAKE )

I, Robert H. Anderson, being first duly sworn, depose and state as follows:

1. I am the individual identified in the Amended Complaint in this matter as Roe 2. I began working for the State in December 1971, and have continued to do so since that time. I have spent my entire 34-year career with the Department of Health.

2. The Department of Health has participated in the Unused Sick Leave Retirement Option Program (the "Program") since that program came into existence.

3. The Program allows me to purchase post-retirement health insurance using my unused sick leave hours. The ability to earn health insurance coverage for after my retirement has been an important incentive for me to remain with the State. At the time that the State first introduced the incentive program that allowed employees to convert their unused sick leave time into health insurance coverage, I was considering leaving the State to find a better paying position with a private employer. The ability to earn additional health insurance coverage was one of the key factors in my decision to stay with the State. I decided that although working for the State would mean receiving a lower salary, I would be compensated by receiving better benefits, with the ability to convert unused sick leave hours into health insurance being a big reason why I believed the State offered better benefits.

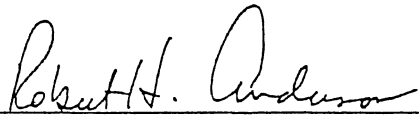
4. Because it was so important to me to preserve my sick leave hours so that I could convert them into health insurance coverage, I did everything I could not to use my sick leave hours. When sick, I would use my annual leave time rather than my sick leave hours. Never once did I anticipate converting my unused sick leave hours into a 401(k) contribution or cash. The reason that I came to work and put in the additional hours was to earn additional health insurance coverage after I retired, not an additional 401(k) contribution or some extra cash.

5. Over my career, I have accumulated over 2,300 unused and converted sick leave hours in reliance upon the Program. Thus, if I retire before the end of the year, I will have health insurance coverage for an additional 291 months. (This includes the 60 months of post-retirement coverage automatically supplied by the State.) If I retire after HB 213 becomes effective, I will have at most 218 months of coverage (if I retire during 2006), and possibly as few as 158 months of coverage (if I retire in 2010 or later). By reducing the amount of health

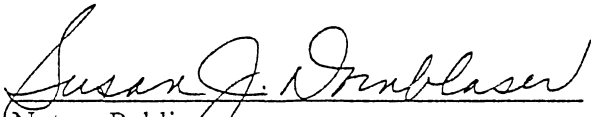
insurance coverage that I will receive by 73 to 133 months, HB 213 will significantly reduce the total compensation that I receive for my many years of service to the State.

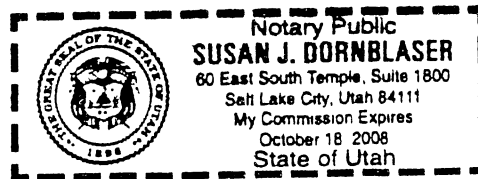
6. Before HB 213 was enacted, I had planned to continue working for at least two or three more years. I do not want to retire this year. For one thing, it will be very difficult to find comparable employment at my age. However, I am now seriously considering retiring this year, before the effective date of HB 213, due to HB 213's adverse affects upon my benefits. It does not make much sense to me to work longer to receive fewer benefits.

DATED this 15 day of September, 2005.

  
Robert H. Anderson

Subscribed and sworn to before me this 15<sup>th</sup> day of September, 2005.

  
Notary Public



00050

BENSON L. HATHAWAY, JR. (Bar No. 4219)  
 STEPHEN W. GEARY (Bar No. 9635)  
**KIRTON & McCONKIE**  
 60 East South Temple, #1800  
 P.O. Box 45120  
 Salt Lake City, Utah 84145-0120  
 Telephone: (801) 328-3600

Attorneys for Plaintiffs

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
 SALT LAKE COUNTY, STATE OF UTAH

---

UTAH PUBLIC EMPLOYEES	:	
ASSOCIATION and ROES 1 through 5,	:	<b>AFFIDAVIT OF ROBERT VALERIO</b>
	:	
Plaintiffs,	:	
	:	Civil No. 050911548 mi
v.	:	
	:	Judge William W. Barrett
STATE OF UTAH,	:	
	:	
Defendant.	:	
	:	

---

STATE OF UTAH                    )  
   : ss.  
 COUNTY OF SALT LAKE    )

I, Robert Valerio, being first duly sworn, depose and state as follows:

1. I am the individual identified in the Amended Complaint in this matter as Roe 3. I began working for the State in July 1978 when I was 18 years old. I worked for the State, primarily in the Corrections Department, for more than 27 years.

2. As long as I can recall, the Corrections Department has participated in the Unused Sick Leave Retirement Option Program (the "Program") since that program came into existence.

3. One of the main reasons I continued working for the State was the ability, through the Program, to earn continuing health insurance coverage for myself and my family after I retired. My supervisors and other State representatives repeatedly emphasized to me the importance of preserving my sick leave hours so that I could use them to purchase health insurance coverage after I retired, and I always did my best to avoid using my sick leave hours.

4. I retired from working for the State in August 2005 due solely to HB 213. I had always planned to work for the State at least until I had completed 30 years of service in July 2008 and qualified for full pension benefits, but I simply could not afford to lose a large portion of the health insurance coverage that I had already earned. By the time that I was deciding whether to retire to avoid HB 213, I had accumulated over 1,850 hours of unused and converted sick leave. Thus, according to my calculations, I would have lost nearly 7 years of health insurance coverage if I had continued working until 2008.

5. Because I began working at a relatively young age, I also planned to retire at a relatively young age, which meant that I needed those extra years of health insurance to cover my family until I became Medicare eligible at age 65. I wasn't just planning to use my unused and converted sick leave hours for Medicare supplemental insurance, I was planning to use them for my family's primary insurance (I am a single parent, and my youngest daughter is only 15 years old). Before HB 213, based solely on the number of unused and converted sick leave hours that I have already accumulated, I would have had health insurance coverage until after I reached age 65 if I continued working until July 2008. Under HB 213, however, even if I worked until July 2008, I would have been nearly 5 years short of having health insurance coverage until I reached age 65. By retiring this year, and avoiding HB 213, I will be less than 1 year short of having health insurance coverage until age 65, but I will still be a few months short.

6. Once HB 213 passed, and I realized that the only way that I could keep all of the health insurance benefits that I have earned was to retire before the end of the year, I felt like the State had painted me into a corner with no good options. On the one hand, if I retired before the end of the year to save all of my health insurance, then I would not be able to qualify for my full pension as I had always planned. On the other hand, if I kept working to qualify for my full pension, then I would not be able to keep all of the health insurance coverage that I had already earned. I felt like the State had forced me to decide between giving up a portion of the pension that I had been working for, or giving up a portion of the health insurance coverage that I had been working for. In either case, it seemed like the State was going back on its promises to me.


7. My decision was especially difficult given the fact that it is not easy for someone my age to find comparable work at a comparable salary. When you are young, you have lots of options. But when you get older, and have put in a lot of years with one employer, you don't have as many options. If I retired, I would not only be leaving behind my old job, I would also be leaving behind all of the seniority that I had obtained during my 27 years with the State. If I went somewhere else, I would be forced to start all over again at the bottom of the ladder. In fact, I am now working in a part-time position at an hourly rate that is barely 50% of what I was making with the State.

8. Although it was an extremely difficult decision to make, I ultimately decided that I had no other choice than to retire now so that I could keep all of my health insurance. I did everything I could to maximize the amount of my pension. For example, I withdrew the majority of the funds from my 457 and 401(k) plans (to which I had been contributing 15% of my salary each year) to purchase all of the years of service credits for which I qualified. Nonetheless, I will

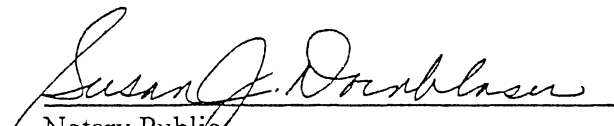
still receive substantially less than what I would have received had I continued working for the State until July 2008 and qualified for my full pension benefits.

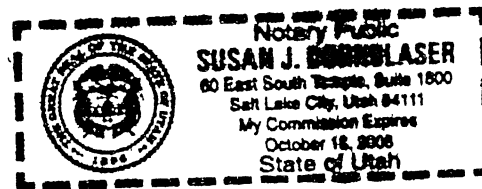
9. The entire process of unexpectedly having to consider retiring earlier than I had expected was overwhelming and traumatic. There was nothing easy about my decision, and it has imposed significant financial hardships upon myself and my family, but HB 213 did not allow me any better options. I feel like HB 213 has cost far more than a job or money, it has forced me out of the career to which I have dedicated my entire adult life.

DATED this 14<sup>th</sup> day of September, 2005.

  
Robert Valerio

Subscribed and sworn to before me this 14<sup>th</sup> day of September, 2005.

  
Notary Public



00054

BENSON L. HATHAWAY, JR. (Bar No. 4219)  
STEPHEN W. GEARY (Bar No. 9635)  
KIRTON & McCONKIE  
60 East South Temple, #1800  
P.O. Box 45120  
Salt Lake City, Utah 84145-0120  
Telephone: (801) 328-3600

Attorneys for Plaintiffs

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

---

UTAH PUBLIC EMPLOYEES	:	
ASSOCIATION and ROES 1 through 5,	:	DECLARATION OF ROE 4
	:	
Plaintiffs,	:	
	:	Civil No. 050911548 mi
v.	:	
	:	Judge William W. Barrett
STATE OF UTAH,	:	
	:	
Defendant.	:	
	:	

---

1. I am the individual identified in the Amended Complaint in this matter as Roe 4. I have worked for the State since July 16, 1984. I am currently employed with the Tax Commission.

2. I am participating in this lawsuit under a pseudonym because I fear adverse employment actions by the State if my identity became known.

3. One of the reasons I have continued working for the State all of these years has been the benefits that I receive as a State employee. One of the most valuable those benefits has



been the right to earn health insurance coverage for after I retire by not using all of my allotted sick leave hours through the Unused Sick Leave Retirement Option Program (the "Program").

4. Throughout my employment with the Tax Commission, the Tax Commission has participated in the Program

5. After I had worked for the State for a number of years, I made the decision that I would continue working for the State for the remainder of my career. I have not used a single hour of sick leave since that time. If I was sick and had to miss work, I would use my annual leave time rather than my sick leave time. I never considered the possibility of converting my unused sick leave hours into cash or a 401(k) contribution. The only reason I was doing everything necessary to avoid using those hours was so that I would have health insurance coverage after I retired.

6. By doing everything I could to preserve my sick leave time, I have accumulated more than 1,600 hours of unused and converted sick leave hours. If HB 213 becomes effective, and I am forced to convert 25% of those hours into a 401(k) contribution at retirement, then contrary to everything that I have been repeatedly told by the State, I will not be able to convert more than 400 of my unused sick leave hours into health insurance. That will represent the loss of more than 4 years of health insurance coverage for me, which will be a significant loss.

7. Because I have worked for the State for less than 30 years and I am not yet 60 years or older, I am not eligible to retire before the effective date of HB 213. Moreover, because I already have so much invested into my career with the State, it would be difficult for me to leave and find a comparable position, with comparable seniority, elsewhere.

Executed on September 14<sup>th</sup>, 2005, at Salt Lake City, Utah. I declare under penalty of perjury pursuant to the laws of the State of Utah that the foregoing is true and correct.

Roe 4

Roe 4

00057

BENSON L. HATHAWAY, JR. (Bar No. 4219)  
STEPHEN W. GEARY (Bar No. 9635)  
**KIRTON & McCONKIE**  
60 East South Temple, #1800  
P.O. Box 45120  
Salt Lake City, Utah 84145-0120  
Telephone: (801) 328-3600

Attorneys for Plaintiffs

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

---

UTAH PUBLIC EMPLOYEES	:	
ASSOCIATION and ROES 1 through 5,	:	<b>DECLARATION OF ROE 5</b>
	:	
Plaintiffs,	:	
	:	Civil No. 050911548 mi
v.	:	
	:	Judge William W. Barrett
STATE OF UTAH,	:	
	:	
Defendant.	:	
	:	

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1. I am the individual identified in the Amended Complaint in this matter as Roe 5. I began working for the State continuously since 1990, and I am currently employed in the Department of Human Services' Division of Services for People with Disabilities.

2. I am participating in this lawsuit under a pseudonym because I fear adverse employment actions by the State if my identity became known.

3. Throughout my employment with the Department of Human Service, the Department has participated in the Unused Sick Leave Retirement Option Program (the

"Program"), whereby employees can apply unused and converted sick leave to purchase continuing health insurance after retirement.

4. I have accumulated nearly 800 hours of unused and converted sick leave, with the understanding that such hours would be used to purchase health insurance after I retire. When I first started worked for the State, I did not fully understand the value of unused and converted sick leave hours, so I used my sick leave hours when I sick. However, when I learned how much more valuable unused and converted sick leave hours were for the purchase of post-retirement health insurance, I began doing everything I could to avoid using my sick leave hours, including using annual leave time when I was sick.

5. Because I have worked for the State for less than 30 years and I am not yet 60 years or older, I am not eligible to retire before the effective date of HB 213. However, HB 213 has caused me to seriously consider seeking employment elsewhere. Without the benefit of being able to convert my unused and converted sick leave hours into health insurance coverage, it does not make as much sense for me to continue working for the State at below market wages. I enjoy my job and would like to continue in the same position, but HB 213's dramatic reduction in my benefits may make it so that I cannot afford not to leave.

Executed on September 15, 2005, at Salt Lake City, Utah. I declare under penalty of perjury pursuant to the laws of the State of Utah that the foregoing is true and correct.

Roe #5  
Roe 5

00059

RECEIVED  
OCT 24 2005  
KIRTON & McCONKIE

Clark Waddoups (3957)  
Heidi E. C. Leithead (5102)  
David C. Reymann (8495)  
Cheyllynn Hayman (9793)  
PARR WADDOUPS BROWN GEE & LOVELESS  
185 South State Street, Suite 1300  
Salt Lake City, Utah 84111  
Telephone: (801) 532-7840  
Facsimile: (801) 532-7750

Thomas R. Lee (5991)  
524 JRCB, Brigham Young University  
Provo, UT 84602-8000  
Telephone: (801) 422-9024

Attorneys for Defendant State of Utah

---

IN THE THIRD JUDICIAL DISTRICT COURT  
SALT LAKE COUNTY, STATE OF UTAH

---

UTAH PUBLIC EMPLOYEES  
ASSOCIATION and ROES 1 through 5,

Plaintiffs,

vs.

STATE OF UTAH,

Defendant.

DEFENDANT STATE OF UTAH'S  
MOTION FOR JUDGMENT ON THE  
PLEADINGS

(Oral Argument Requested)

Civil No. 050911548 mi

Judge William W. Barrett

---

Pursuant to Rules 12(b)(1), 12(b)(6) and 12(c) of the *Utah Rules of Civil Procedure*, Defendant the State of Utah ("State"), by and through its undersigned counsel, respectfully moves the Court for judgment on the pleadings against Plaintiffs Utah Public Employees Association ("UPEA") and Roes 1 through 5. The State is entitled to judgment on the pleadings because (1)


Plaintiffs' claims are not ripe for adjudication; (2) the UPEA lacks standing; and (3) Plaintiffs' substantive claims for breach of contract, takings, and estoppel all fail on the merits.

This Motion is supported by the accompanying Combined Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction and in Support of Defendant's Motion for Judgment on the Pleadings and the Affidavit of Debbie Price, filed concurrently herewith, together with the other pleadings and documents on file herein.

Pursuant to Rule 7(e) of the *Utah Rules of Civil Procedure*, the State respectfully requests a hearing on this Motion.

RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of October 2005.

**PARR WADDOUPS BROWN GEE & LOVELESS**

By:   
Clark Waddoups  
Heidi E. C. Leithead  
David C. Reymann  
Cheylynn Hayman

Thomas R. Lee

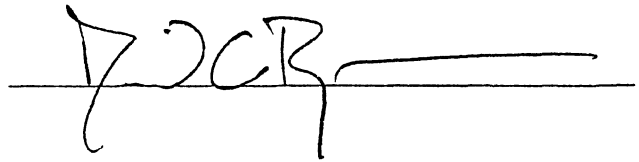
Attorneys for State of Utah

00061

**CERTIFICATE OF SERVICE**

I hereby certify that on the 21 day of October 2005, a true and correct copy of the foregoing **DEFENDANT STATE OF UTAH'S MOTION FOR JUDGMENT ON THE PLEADINGS** was served via hand-delivery on the following:

Benson L. Hathaway, Jr.  
Stephen W. Geary  
KIRTON & McCONKIE  
60 East South Temple, #1800  
P.O. Box 45120  
Salt Lake City, Utah 84145-0120

A handwritten signature in black ink, appearing to read "B. L. Hathaway, Jr.", is written over a horizontal line.

Utah Public Employees  
Association and Roes 1-5,

**VS.**

Defendant.

FIRST HEARING DAY

00063



A P P E A R A N C E S

FOR THE PLAINTIFF:

BENSON L. HATHAWAY  
STEPHEN W. GEARY  
KENNETH BIRRELL  
KIRTON & McCONKIE  
60 East South Temple, #1800  
P.O. Box 45120  
Salt Lake City, Utah 84145

FOR THE DEFENDANT:

CLARK WADDOUPS  
DAVID C. REYMANN  
HEIDI E.C. LEITHEAD  
CHEYLYNN HAYMAN  
PARR, WADDOUPS, BROWN, GEE & LOVELESS  
185 South State Street, Suite 1300  
Salt Lake City, Utah 84111

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I N D E X

WITNESSES

AUDREY WOOD

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MR. TERRY RAY YOCKI

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ROBERT H. ANDERSON

Direct Examination by Mr. Hathaway .....	75
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ROBERT RAY VALERIO

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E X H I B I T S

Plaintiff's Exhibits 1, 3, 4, 5, 6, 7, 8, 10, 16, 19, 20

Defendant's Exhibits 1, 2

00065

1                                    NOVEMBER 7, 2005

2                                    1:32 A.M.

3                                    P R O C E E D I N G S

4                                    \* \* \* \* \*

5  
6                    THE COURT: Well, good afternoon, everybody. Got us  
7 a crowd here, huh? This is Utah Public Employees Association  
8 and others versus the State of Utah, Civil Number 050911548.

9                    May I have your appearances, please.

10                  MR. HATHAWAY: Your Honor, Ben Hathaway appearing for  
11 the plaintiff, I am joined at counsel table by Mr. Steve Geary,  
12 my partner.

13                  MR. WADDOUPS: Clark Waddoups and Heidi Leithead  
14 appearing on behalf of the State of Utah.

15                  We also have at counsel table with us Jeff Herring,  
16 who is the executive director of the -- general resources  
17 management for the State, seated behind us are David Reymann  
18 and Cheylynn Hayman, who are also working on this case.

19                  THE COURT: Okay. Ready to go, Mr. Hathaway?

20                  MR. HATHAWAY: Yes, Your Honor.

21                  THE COURT: All right.

22                  MR. HATHAWAY: If it please the Court, the defendant,  
23 State of Utah and the Public Employees plaintiffs, I'm Ben  
24 Hathaway. Mr. Geary, who I introduced at counsel table and  
25 also Mr. Lorin Barker and Mr. Kenneth Birrell together with me

1 represent the Utah Public Employees Association and the Roe  
2 plaintiffs one through five. We all appreciate the Court's  
3 willingness to move this ahead on the calendar in order to give  
4 the plaintiffs the opportunity to have their motion for  
5 preliminary hearing injunction heard before December 16th. The  
6 significance of that day is it's the last calendar day that a  
7 State employee can retire before House Bill 213 goes into  
8 effect on January 1st of 2006.

9           The plaintiffs in this case have filed this complaint  
10 and this motion seeking, among other things, the preliminary  
11 injunction postponing the January 1st, 2006 effective date of  
12 House Bill 213 until the parties can fully be heard on the  
13 subject.

14           Now, over the next few days, UPEA and Roe Plaintiffs  
15 one through five intend to present evidence that we fully  
16 believe will satisfy the Court that these plaintiffs will  
17 suffer irreparable harm unless an injunction is entered, that  
18 the threatened injury to the plaintiffs outweigh whatever cost  
19 the State may incur if the injunction is entered. Further,  
20 that the preliminary hearing injunction would not be adverse to  
21 public policy, and, finally, that they have a likelihood of  
22 prevailing on merits or at least there are important issues  
23 underlying the claim that presents serious issues that ought to  
24 be considered by the Court in further litigation.

25           Your Honor, House Bill 213 amends Utah Code Annotated

1 67-19-14 along with subsections 14.1, 14.2, 14.3, and then it  
2 adds a new 14.4.

3           Since around 1980, under what is now this code  
4 section, State agencies have had option of providing to their  
5 employees a benefit whereby these opting agency employees could  
6 elect to bank their unused sick leave and then use it either  
7 for their sick leave or bank it upon retirement after an  
8 initial 480-hour reduction to cover a five-year benefit that is  
9 given to the employees by the State, exchange that sick leave  
10 for either a 401(k) contribution, for cash, or to use it to buy  
11 medical coverage at the rate of eight hours for one month of  
12 the medical coverage. And that applies to the employee or the  
13 employees' spouses.

14           For a host of reasons, including luring and keeping  
15 competent public employees, and also in light of the well-known  
16 and substantial disparity in State versus Private Compensation,  
17 and also to incentivize employees not to use that sick leave,  
18 the legislature enacted this accumulated sick leave program.  
19 And that was about 25 years ago.

20           These anticipated benefits were recognized and fully  
21 appreciated by virtually every State agency. Every --  
22 essentially every State agency offered this benefit to its  
23 employees. In particular, those employees that employed the  
24 Roe plaintiffs all participated in the unused sick leave  
25 retirement option program.

1           Now, over the past 25 years this program has been a  
2 wonderful success. It's resulted in thousands of State  
3 employees choosing not to use sick leave but to bank it for the  
4 future. Consequently, the desired results of luring and  
5 keeping qualified employees, of minimizing the disparity and  
6 minimizing the use of sick leave has been realized. The  
7 sacrifices of just these five individual plaintiffs alone  
8 represent thousands of hours of time spent on the errand of the  
9 State rather than home sick in bed.

10           Now, first House Bill 213 phases out this five-year  
11 automatic coverage presently afforded to State employees. It  
12 does that in one-fifth annual increments. An employee retiring  
13 in 2006 will receive the five years' coverage, one in 2007 will  
14 receive one-fifth less, and so on until an employee retiring in  
15 2011 will receive zero years of automatic coverage.

16           This is offset partially by the corresponding  
17 decrease in the 480 hours that are taken off the top of  
18 accumulated sick leave under the existing program. And that  
19 comes off in corresponding 96-hour increments per year up  
20 through 2011.

21           Now, the House Bill 213 goes beyond that and changes  
22 the incentive program by directing that all unused sick leave  
23 accumulated prior to January 1st, 2006, that that is  
24 essentially all accumulated sick leave that's earned prior to  
25 the effective date of House Bill 213 can be -- can no longer be

1 redeemed as cash in the discretion of the Employee, but there's  
2 a mandatory 25 percent amount taken, times by the employee's  
3 retiring salary, however, not less than the average of all  
4 retirees and applied to the employee's 401(k) plan. The  
5 balance, then, of any unused sick leave under program one,  
6 which are the sick leave hours accumulated prior to January 1st  
7 of 2006, may be used to purchase the medical coverage at the  
8 eight-to-one ratio.

9 Now, the UPEA is a nonprofit association of public  
10 employees who work for the various State agencies. Presently,  
11 the UPEA has approximately 8,300 members. Of those, 5,000 are  
12 in active full-time employment in the public sector; of the  
13 5,000, approximately 90 percent or 4,500 are employed by the  
14 various agencies in the State.

15 UPEA's policies are set and its business is overseen  
16 by a board of public employee members elected from the  
17 membership at large. Its business is brought to fruition  
18 through its able staff, headed by an executive director whose  
19 name is Audrey Wood.

20 Roe Plaintiff One is Mr. Terry Ray Yockey.  
21 Mr. Yockey is a 61-year-old clinical social worker who has been  
22 employed by the Department of Human Services of the State of  
23 Utah since July 1st of 1971. He holds a bachelor's degree in  
24 psychology and a master's degree in social work.

25 Mr. Yockey's compensation is comprised of salary, of

1 insurance benefits, of a pension, of his annual and his sick  
2 leave. By comparison, according to the State's own records,  
3 Mr. Yockey is underpaid approximately 16.5 percent below the  
4 mean compensation paid social workers along the Wasatch Front.

5 Now, over the years of State employment, and  
6 particularly over the past 25 years since this unused sick  
7 leave program has been in effect, Mr. Yockey has chosen to  
8 accumulate approximately 1,900 hours of unused sick leave.  
9 This accumulation has been made possible by Mr. Yockey choosing  
10 to, over the course of the past 25 years, use annual leave when  
11 he might be sick or have a medical need. It's been accumulated  
12 by him sometimes by coming to work when perhaps he would have  
13 been justified in not coming to work and staying home sick.  
14 However, given the importance of this benefit to Mr. Yockey, he  
15 has undertaken to accumulate as much as he has been able to  
16 over that time.

17 Mr. Yockey had planned to retire in April of 2006.  
18 If Mr. Yockey goes ahead and retires as planned, under House  
19 Bill 213 with all the mandatory adjustments and withdrawals, he  
20 will lose 59 months, almost a full five years of medical  
21 insurance coverage from what he would have received under the  
22 present act.

23 Now, like Mr. Yockey, Roe Number Two is Mr. Robert  
24 Anderson. He's been employed by the State for 34 years. He's  
25 a manager of administrative services in the Department of



1 Health. Through a combination of fitness, use of annual leave  
2 as necessary for health issues and on occasion working when  
3 under other circumstances he might have remained home and used  
4 sick leave, Mr. Anderson over his career has accumulated in  
5 excess of 2,300 hours of unused sick leave. In addition, he  
6 has accumulated annual leave and worked hard to put aside some  
7 savings in his 401(k). Mr. Anderson planned to retire in May  
8 of 2006, however, if he retires in May as planned with House  
9 Bill 213 in effect those 2,300 hours will buy Mr. Anderson 72  
10 months less, that is an even six years less medical coverage  
11 than they do under the existing program.

12 Roe Number Three is Mr. Robert Valerio. Mr. Valerio  
13 went to work for the State in the corrections department in  
14 1978. Recently, Mr. Valerio retired. He retired on July 1st  
15 of this year, shortly after the complaint in this matter had  
16 been filed. Given Mr. Valerio's health-related concerns and as  
17 he was otherwise qualified to retire, when another employment  
18 opportunity presented itself that in his judgment would enable  
19 him to care for himself and his 15-year-old dependent child  
20 beyond that that would have been possible under the act if  
21 House Bill 213 goes into effect, he retired.

22 Mr. Valerio had long planned to wait to retire until  
23 achieving 30 years of service, which would have been July of  
24 2008, but since House Bill 213 would have cost him  
25 approximately 58 months of coverage, he believed that he could

1 not risk losing the nearly five years of coverage and really  
2 had no choice but to retire.

3 Now, Roes Four and Five respectfully seek to remain  
4 anonymous, each fears reprisal for their participation in this  
5 suit and respectfully requests and we will formally request at  
6 the appropriate time to be heard in chambers. Their testimony  
7 is not unlike that of Roes One through Three. Four and Five,  
8 though, are among State employees who are not yet qualified for  
9 retirement. They, as we sit here today, do not have that  
10 option. Four has 21 years of employment and Five has 15 years.  
11 Notwithstanding, they each have considerably fewer years of  
12 service by employing similar means as those used by Roes One  
13 through Three, both of these plaintiffs have accumulated large  
14 numbers of unused sick leave. Four has 1,610 hours; and Five  
15 has 796 hours.

16 While retirement is less imminent for Four and Five,  
17 the immediate value of the sick leave benefit is fully  
18 understood and has historically been relied on by both. Four  
19 and Five have faithfully served their employer for the State  
20 for many years and planned to fulfill distinguished careers  
21 retiring when eligible after at least 30 years of service;  
22 however, with the passage of House Bill 213, each stands to  
23 lose somewhere around 25 percent in value of the accumulated  
24 sick leave through the end of this year.

25 Every one of the plaintiffs, Your Honor, has served

1 The State of Utah with distinction. Their combined experience  
2 totals over 131 years of dedicated service to the State's  
3 various agencies. Add to that the unused sick leave of 8,450  
4 hours and it amounts to almost four additional years of service  
5 to the State by virtue of just these five employees taking  
6 advantage of the program and accumulating the unused sick  
7 leave, notably one of the primary objectives of passing the  
8 original program in the first place.

9           No one of them has had to spend their entire career  
10 at the State, no one of them has had to continue working for  
11 the compensation package substantially lower than that offered  
12 in the private sector, no one of them has had to take personal  
13 time to use annual leave to care for his or her own health or  
14 that of their loved ones, and no one of them has had to come to  
15 work when perhaps judgment would have dictated they stay home,  
16 but they chose to.

17           Every one of the plaintiffs, along with thousands  
18 represented by the UPEA, chose to participate in the option  
19 program offered them by the agencies they work for and yielded  
20 in so doing the desired result to these agencies, to the State  
21 of Utah. And now -- I need to note, Your Honor, every one of  
22 the plaintiffs fully understands that a State, the State in  
23 this case can take away benefits respectively, it can change  
24 the program, it can take away virtually every aspect of the  
25 benefit that is provided as a compensation package to its

1 employees prospectively.

2 But when the State takes away what it has already  
3 given its employees, that constitutes an unlawful taking.  
4 Further, Your Honor, it damages the State's most valuable  
5 asset, its distinguished and conscientious employees. Frankly,  
6 it's no different than informing its employees at the end of  
7 the year, Gee, folks, we apologize, we overpaid you by 10  
8 percent, you're going to have pay us back. That is what the  
9 State has undertaken to do in regard to or through House Bill  
10 213. The accumulated unused sick leave and the career choices  
11 already earned by and presently in the pockets of the  
12 plaintiffs and the represented employees which again reflect in  
13 the thousands of unused sick leave hours will be worth  
14 considerably less on January 1st of 2006 unless this court  
15 stays the effective date of House Bill 213.

16 It's for these reasons, Your Honor, and the others  
17 that we will show that at the conclusion of the hearing we'll  
18 respectfully ask the Court to determine that the parties, the  
19 plaintiffs would be irreparably harmed if we don't get an  
20 injunction, that the cost of the contemplated taking far  
21 outweighs the value of maintaining status quo to the State,  
22 that public policy really favors an opportunity for this court  
23 and the parties to look under the sheets of House Bill 213 and,  
24 finally, Your Honor, that there is a likelihood that the  
25 plaintiffs will prevail and at least that their claim presents

1 serious issues on the merits which should be subjected to  
2 further litigation. Thank you.

3 THE COURT: Mr. Waddoups?

4 MR. WADDOUPS: Thank you, Your Honor.

5 Your Honor, this case is an interesting case in that  
6 it raises the issue of whether these State employees and the  
7 Utah Public Employees Association joined with them can  
8 successfully use this court to overturn a policy decision that  
9 was made by the legislature of the State of Utah to address  
10 certain physical concerns that it had with the structure of the  
11 State's compensation plan. And I'm going to review what the  
12 issues were that moved the legislature to take that action and  
13 talk about how they addressed them and why that doesn't raise  
14 legal issues that the plaintiffs seek redress for in this  
15 court.

16 During the 2005 legislature session the Court passed  
17 House Bill 213. There were several concerns that motivated the  
18 legislature as is evident from the discussions in the context  
19 of that bill.

20 First of all, under the existing benefit program, as  
21 Mr. Hathaway has told you, unused sick leave which has been  
22 accumulated can be converted upon retirement to purchase  
23 medical insurance benefits. The unused -- and I wish to  
24 emphasize that the statute and the regulations are very clear  
25 that this becomes available to the retiring employee only upon

1 retirement. But after retirement, after certain adjustments  
2 which I'll explain in more detail, they can convert eight hours  
3 of unused sick leave to one month of medical coverage.

4 About the time when this was adopted, the cost of  
5 medical coverage was significantly less, it was somewhere  
6 approximately the cost of the eight hours of service. As time  
7 has gone on and the cost of medical coverage has increased,  
8 which has become a problem for many different industries and  
9 employers, not just the State, this balance got out of line.

10 In the example that was used by the office of  
11 legislative fiscal analysts in connection with the bill, they  
12 said that the average cost of eight hours of employment is  
13 about \$160. One month of double coverage they compared that to  
14 is now \$760. So the cost to the State in terms of what it  
15 realizes in terms of employee benefits for unused sick leave  
16 now is significantly out of line with the cost of medical  
17 coverage, and this distinction is prospectively increasing.

18 This fact is demonstrated by the actual numbers of  
19 what it's cost to provide medical benefits for retired  
20 employees. In 19 -- for fiscal year 2001, that cost was  
21 approximately \$8.3 million. For fiscal year 2005, which was  
22 just completed, that cost had increased to 15.8 million or 190  
23 percent, almost double of what the cost to the State was for  
24 providing these benefits. These concerns continued -- the  
25 State addressed the concerns that if this cost continued to

1 increase, they had a fixed obligation that they could not  
2 accurately project what the cost would be because the cost of  
3 medical coverage in the future could not be known, only  
4 projected and all the projections were that it would  
5 significantly increase. Now, this problem created the issue of  
6 whether or not increasing budget amounts would have to be spent  
7 on paying retirement benefits rather than used for other  
8 purposes such as increasing services, increasing employee's  
9 salaries, the need to increase taxes, and the ability to remain  
10 fiscally sound as a State. And I would emphasize, Your Honor,  
11 that this is a policy decision that was presented for the  
12 legislature and it was one it wanted to address, which is  
13 exactly the correct area program.

14           The other concern that was expressed during the  
15 legislative discussion of this bill was what has been known as  
16 the constructive receipts. Under the existing law, again as  
17 Mr. Hathaway explained, 25 percent of the accumulated unused  
18 sick leave can be converted to cash. As an example, if we use  
19 Mr. Robert Anderson, one of the plaintiffs as an example, he  
20 has approximately 2,300 hours of accumulated sick leave, 25  
21 percent of those hours could be converted to cash or 575 hours,  
22 at his approximate rate of pay of \$25.93 per hour, for a sum  
23 total of \$14,910. If he elects to receive that amount of money  
24 in cash upon his retirement, that then becomes taxable income.  
25 The Internal Revenue Service, however, has adopted rules and

1 regulations that says if you have the option to receive that  
2 cash, but elect not to, to do something else with it, it's  
3 treated as constructive income and you are taxed on it  
4 nonetheless and the State is required to withhold taxes on that  
5 amount of money. So to address this problem, the legislature  
6 felt they needed to revise the bill, and one of the things that  
7 they did was address that option to convert that money to cash.

8           In Mr. Robert Anderson's case, upon his retirement if  
9 he were to convert that money to cash, the tax liability --  
10 regardless of whether he converted it to cash or not, the tax  
11 liability would be in excess of \$4,000, plus penalties.

12           Now, finally, the other concern that the legislature  
13 addressed was under the accounting rules which have been under  
14 revision the State will have to account for these growing  
15 potential risks in its financial statement and it will affect  
16 the reporting requirements for the State and its bond rating  
17 and other aspects of how the State must treat with its physical  
18 capabilities.

19           So what did the legislature do to address these  
20 concerns? First of all, and we wish to emphasize, with respect  
21 to the accumulated unused sick leave hours through the end of  
22 this year, through the end of 2005, there was only one change  
23 that affects that change. They did not take these hours away,  
24 they did not take away the ability to convert these into  
25 medical leave. What they did is eliminate the ability to



1 convert 25 percent of those hours into cash.

2 Under the IRS regulations, which the legislature  
3 attempted to comply with, they are allowed to require the 25  
4 percent be contributed to a 401(k) tax plan -- or retirement  
5 plan, and that contribution then does not qualify as  
6 constructive receipt of income and eliminates the tax  
7 liability. And I will emphasize in a moment when I go through  
8 some examples how this can affect from employee to employee in  
9 terms of how much of an impact this actually is.

10 I wish to emphasize that under the new legislation,  
11 House Bill 213, the employees can still convert the unused sick  
12 leave to medical coverage at the same rate of eight hours for  
13 one month and that will continue to be in place as long as they  
14 retire under this program.

15 The second thing that the legislature did is they  
16 changed the way that accumulated sick leave may be used  
17 beginning after January 1. I need to emphasize again, this is  
18 not for hours accrued through the end of this year, but hours  
19 that begin to accrue starting during the next year. And  
20 Mr. Hathaway recognized during his opening that the State has  
21 the right prospectively to change these, and I think it's not  
22 being challenged by the public employees, as I understand it,  
23 going forward in the future, but I think it's helpful to  
24 understand what they did.

25 Rather than convert the accumulated sick leave to

1 medical coverage of eight to one, the money is then valued at  
2 the employee's wage at the time of retirement and then  
3 contributed to an account, a medical account that can then be  
4 used by the employee for medical reimbursements, which  
5 including purchasing medical coverage, it may also include  
6 copayments or other items that would not be available under the  
7 existing medical program or available under other insurance  
8 that they may have.

9           Now, under the -- the third aspect of this which was  
10 affected by House Bill 13 is that under the existing law an  
11 employee receives up to five years of medical insurance upon  
12 retirement. That's the equivalent of 480 hours of accumulated  
13 unused sick leave. For example, if an employee were to retire  
14 at age 45, he could receive approximately five years or he  
15 could receive five years of additional medical coverage before  
16 he would then be required to use his accumulated unused sick  
17 leave. If, however, he retires after age 60, at age 62, for  
18 example, he only continues to receive this benefit until he  
19 reaches the age where he qualifies for Medicare. Assuming  
20 that's 65 in most cases, the employee would then have three  
21 years' coverage. Nevertheless, the 480 hours is still deducted  
22 from his unused sick leave. And the legislature made changes  
23 to that.

24           First of all, they phased out the five years over a  
25 five-year plan so that by the year 2010 there is no automatic

1 medical coverage that is provided. The second is that they've  
2 reduced the amount that is deducted so that eventually for  
3 anyone essentially over age 61 there will be ultimately a  
4 benefit to them in terms of not being able to deduct this from  
5 their unused sick leave.

6 Now, at the same time that the legislature passed  
7 House Bill 213, it also passed a supplemental appropriations  
8 act under which they expressly stated that to offset some of  
9 the savings the State would realize from passing House Bill 213  
10 they would pay increased compensation, and it sets a formula,  
11 which I won't go into detail because I don't think it's  
12 directly relevant, but they did provide a benefit of increased  
13 salary for the State employees as a result of this.

14 Because it is important for the Court to understand  
15 how this bill applies, let me walk through a chart which goes  
16 through the provisions of the bill and shows how they apply.

17 This comes from the State's website and is available  
18 to all public employees to review. If I may hand this up to  
19 the Court.

20 **THE COURT:** That would be great. Thank you.

21 **MR. WADDOUPS:** If you start on the left-hand column,  
22 this chart outlines the current benefit features and then shows  
23 the effect of House Bill 213.

24 As I explained, the first benefit is the value of  
25 sick leave that can be transferred to a 401(k) plan or used to

1 purchase health care or converted to cash. And as I explained  
2 under program one, which is the hours accrued through the end  
3 of this year, 25 percent of this will go mandatorily into a  
4 401(k) plan. This amount, however, will vary depending on when  
5 during the year the employee retires. And I'll show how that  
6 can affect the employees to their benefit depending on the  
7 circumstances.

8 For program two hours, which are those accumulated  
9 after January 1, the 25 percent goes again into the 401(k)  
10 plan, this is to address the IRS tax problem.

11 The second feature is the reduction of the automatic  
12 health care coverage, the 480 hours I talked about, and  
13 outlines how this deduction is phased out over various years  
14 until 2010, and then it also demonstrates that for hours that  
15 are accumulated after January 1, there's no requirement for  
16 reduction.

17 Under the existing law, the amount of money that's  
18 available after subtraction of the 480 hours is available to  
19 purchase health care coverage at the eight-to-one ratio we  
20 talked about. That continues to be available under program one  
21 after the deduction of the 401 contribution. Under the program  
22 hours that are accumulated after the end of this year, they go  
23 into a fund that no longer guarantees the eight-to-one purchase  
24 ratio.

25 The next line shows that there's a benefit to

1 employees who retire after age 65 in terms of the declining  
2 amount that is reduced from the automatic coverage.

3 And, finally, the last column, which I don't think is  
4 directly at issue but is a benefit under which 320 hours of  
5 sick leave that has been converted can be used to purchase  
6 payout, and that is not -- it has changed only under the new  
7 program one hours and the effect.

8 Now, to try to show how this applies in a particular  
9 case we take an example of Mr. Anderson, if I may hand the  
10 Court two of these --

11 **MR. HATHAWAY:** Your Honor, with all due respect, I am  
12 really going to have to object to the use of these exhibits  
13 because I don't think the foundation has been laid adequately  
14 for the facts that reflect on those, and I would request  
15 respectfully that they not be offered.

16 **THE COURT:** I don't think he's offering them at all  
17 at this stage.

18 **MR. HATHAWAY:** I understand that, Your Honor, but I  
19 think there may be undue weight given to these documents.

20 **THE COURT:** There may or may not be, but I'm going to  
21 overrule the objection.

22 **MR. WADDOUPS:** And we will present the evidence that  
23 will show how this is applied.

24 But in Mr. Anderson's case we have the 2,300 hours  
25 that he represented. Under -- under the existing program --

1 let me see -- if he were to work until May 1, 2007, he would  
2 end up after the deduction of the 480 hours with 820 usable  
3 accumulated sick leave hours, which would convert to 228  
4 hours -- 228 months of medical coverage, plus the 60 months  
5 that he would receive, for a total of 288 months of medical  
6 coverage after retirement.

7 Now, we've shown the \$4,000 for which he would be  
8 subject to liability under the tax law. Under House Bill 213,  
9 if you follow the same analysis making all of the deductions,  
10 subtracting the mandatory 25 percent contribution to his 401(K)  
11 plan and following the same math clear through, for the hours  
12 accrued through the end of this year, he would have 168 hours  
13 or a total, once you add in the 48 hours a month of paid  
14 insurance to which he'd be eligible, you end up with 216, which  
15 as the plaintiffs have told you under this scenario would be  
16 significantly less hours.

17 Part of the problem with this case which we will show  
18 in the evidence is we don't know yet how this will effectively  
19 apply to any employee.

20 For example, if Mr. Anderson were to elect to retire  
21 on January 2nd, 2007 rather than May 1, 2007, the net effect  
22 would be that he ends up with 288 hours, exactly the same  
23 number of hours that he has under the existing program. And  
24 the reason for that, Your Honor, is that this 401(k)  
25 contribution is limited by the IRS regulations to the maximum

1 amount of income that has been earned in that year. So if you  
2 retire on January 2nd of any year, you only have two days of  
3 income and your contribution is limited to that amount and so  
4 the amount that is reduced for your 401(k) contribution is  
5 significantly less. And in this case we have assumed that it  
6 would be paid for under the program two hours, which the  
7 program allows.

8           So the effect in this particular case would be  
9 exactly the same as under the existing law. Now, just as a  
10 quick example, and I won't go through the entire chart, but if  
11 Mr. Anderson were, for example, to elect to retire at age 65,  
12 he would actually end up with additional benefits, 288 benefits  
13 more than he would have under the existing law under House Bill  
14 213.

15           And the part of this example is, Your Honor, that is  
16 the situation with every single employee of the State. They  
17 may end up with the benefit under House Bill 213 depending on  
18 their particular circumstance or they may not. And there may  
19 be a number of factors which would affect whether or not it's a  
20 benefit or not a benefit. Do they use up their accumulated  
21 sick leave for a necessary illness? Do they leave State  
22 employment before retiring, in which case they have no benefit  
23 to them at all? When during the year do they choose to retire  
24 and maximize their 401(k) contribution? All of these affect  
25 the interplay as to whether or not House Bill 213 effects them

1 or does not affect them in a negative way.

2 Your Honor, we want to address very briefly why we  
3 have filed motions, as the Court knows, that this case should  
4 be dismissed as a matter of law on the pleadings. For the same  
5 reasons we've outlined in those motions, the injunction should  
6 be denied.

7 Let me address the standard for preliminary  
8 injunction and why we think the case does not warrant issuance  
9 of a preliminary injunction. The first is on the merits.  
10 There are procedural reasons and judicial reasons that we will  
11 address, but let me go first of all to the merits as to why  
12 this claim should not prevail.

13 The plaintiffs have asserted three claims. One is an  
14 unconstitutional taking under the constitution, second is  
15 breach of contract claim, and the third is a claim for  
16 promissory estoppel.

17 Starting first of all with the taking claim,  
18 Your Honor, this court is without jurisdiction to hear that  
19 claim because as strictly required by Utah statute and case  
20 law, the plaintiffs failed to give the proper notice, and that  
21 leaves us in a situation where those claims -- that claim  
22 cannot be heard. But even if the Court were to have  
23 jurisdiction on that claim, there is no taking. These rights  
24 are not vested rights. It is very clear both in the statute  
25 and in the regulations that these do not become vested rights.



1 This option is available to the retiring employee upon  
2 retirement and not until retirement, and the regulations make  
3 it very clear that the State can change that regulation at any  
4 time.

5 Second, with respect to the -- for example, and I'll  
6 we'll give the Court copies of these later on, but regulation  
7 477-7-6 provides that the State agency can withdraw from its  
8 participation in the program in any year, and more to the point  
9 it provides that the employee can voluntarily participate and  
10 then says, quote, "The decision to participate shall be made at  
11 retirement." These rights simply are not vested.

12 With respect to the contract claims, Your Honor, it  
13 is very clear under Utah law that public employees' rights are  
14 subject to and/or governed by statute. It is well recognized  
15 that the legislature has within its prerogative a right to  
16 change the statute at any time in its wisdom it deems  
17 appropriate to do so. In this case they addressed those  
18 concerns and changed the rights that are available to the  
19 employees.

20 Now, there are exceptions to that. They cannot take  
21 away or change a contract right. But a contract right has to  
22 be, as one court said, something that replaces the rights under  
23 the statute or some other separate voluntary undertaking by the  
24 State that is different from the existing statute. The  
25 plaintiffs in this case do not claim they have a contract right

1 that is separate and apart and independent of the statute, the  
2 source of their rights is the statute itself and as such their  
3 contract claims fade.

4 Finally under the promissory estoppel claim, as the  
5 court well knows, the times when promissory estoppel can be  
6 asserted against the government and State agency are very, very  
7 strict. They simply are not met in this case.

8 Now, finally two additional points. I spent some  
9 time talking about Mr. Anderson and the other employees to  
10 emphasize the point that this case is not right. The statute  
11 has not gone into effect, not a single employee has yet been  
12 affected by the statute, nor do we know under the present facts  
13 how they will be or would be affected. Their health may  
14 change, they may die, they may be terminated, they may choose  
15 to retire under a circumstance where the benefit to them is  
16 greater under House Bill 13 than it is under the existing  
17 statute. This court, as you well know, as the Court well  
18 knows, does not make decisions upon the hypothesis of what may  
19 happen in the future, but based on existing facts this case is  
20 not --

21 Finally, Your Honor, we have objected that the Utah  
22 Public Employees Association does not have proper association  
23 in standing. The reason for this challenge is that under the  
24 law an association can sue on behalf of its members if the  
25 interest of its members are uniform and not individual and

1    separate.

2               In this particular case, the interest of the members  
3    cannot be uniform. Some of the members will be benefited, some  
4    of them may be hurt. Some of them may like the program, some  
5    of them may not. And they simply -- the association is simply  
6    not in a position to assert those claims. Any individual  
7    damage does not occur to the membership as a whole, but to the  
8    individuals as a whole.

9               I think as Mr. Hathaway told us, there were 4,500  
10   members of the UPEA, there are 23,500 State employees  
11   approximately. Even among those 4,500 employees, the interest  
12   will not be uniform. For those reasons, Your Honor, at the  
13   conclusion of the evidence we will urge the Court to dismiss  
14   the case and to deny the motion for preliminary injunction.  
15   Thank you.

16              **THE COURT:** Thank you, Mr. Waddoups.  
17              Mr. Hathaway?

18              **MR. HATHAWAY:** Your Honor, I have a binder of  
19   exhibits, if I may approach, and I also have a list of  
20   stipulated exhibits I'd like to review briefly to make sure  
21   we're on board. There should be a list -- do you have a copy  
22   of --

23              **THE COURT:** I have.

24              **MR. HATHAWAY:** Exhibit No. 1, the parties have  
25   stipulated to its authenticity as well as to its admissibility.

1 Exhibit No. 3 the parties have stipulated to authenticity as  
2 well as admissibility, and the same holds true for 4, 5, 6, 7,  
3 and 8. The parties have stipulated to the admissibility and  
4 authenticity of Exhibit 10 as well as to Exhibit 16,  
5 Exhibit 19, and Exhibit 20.

6 Otherwise, the parties have stipulated to the  
7 authenticity of all the remaining exhibits but not necessarily  
8 to admissibility and we'll address those as we present them.

9 THE COURT: So are you offering those?

10 MR. HATHAWAY: Yes, Your Honor.

11 THE COURT: One through eight, ten, 16 and 19 and 20?  
12 Did I get them right?

13 MS. LEITHEAD: Number 1, 3 through 8, not number 2.

14 THE COURT: Two is not?

15 MS. LEITHEAD: Three through eight?

16 MR. HATHAWAY: Yes.

17 MS. LEITHEAD: No. 10, 16, 19 and 20. Is that what  
18 you have?

19 MR. HATHAWAY: Yes.

20 THE COURT: Okay. So one is received, three through  
21 eight are received, ten is received, 16, 19 and 20 are  
22 received.

23 (Plaintiff's Exhibit Nos. 1, 3, 4, 5, 6, 7, 8, 10,  
24 16, 19 and 20  
25 were received into evidence.)

1 MR. HATHAWAY: Your Honor, we would call Audrey Wood.

2 AUDREY WOOD,

3 called as a witness by the Plaintiff, having been duly sworn,  
4 was examined and testified as follows:

5 DIRECT EXAMINATION

6 BY MR. HATHAWAY:

7 Q Ms. Wood, would you please state your full name for  
8 the record.

9 A Audrey K. Wood.

10 Q Tell us briefly, if you would, what your education  
11 is.

12 A I have a Bachelor of Science in business  
13 administration. I am currently enrolled in an MBA program.

14 Q Are you employed presently?

15 A Yes.

16 Q Where?

17 A At the Utah Public Employees Association.

18 Q How long have you been employed there?

19 A I've been employed there since April 22nd, 1989.

20 Q And what is your position presently?

21 A Executive director.

22 Q How long have you served as the executive director?

23 A Almost three years.

24 Q Could you give us a little background about the Utah  
25 Public Employees Association. Tell us, what is its purpose?

1           **A**     The Utah Public Employees Association has been in  
2     existence since 1959. We have served the interest of public  
3     employees as a labor association and our goals are committed to  
4     putting forth the efforts of public employees and to making  
5     sure that the public views public employees as an asset to the  
6     State of Utah.

7           **Q**     How is it that the business of the UPEA is  
8     accomplished?

9           **A**     The business of UPEA is accomplished through our  
10    State board of directors. I am employed by a body of 11  
11    individuals, four of them are elected officers and seven are  
12    elected from a body called our advisory council that is made up  
13    of representatives of employees throughout the State.

14          **Q**     What does your administrative staff consist of?

15          **A**     My staff consists of myself, I have a deputy director  
16    who handles our grievance issues. We currently have five  
17    full-time employee relations representatives who travel  
18    throughout the State to address employee needs and concerns on  
19    the job, and then we have three clerical staff.

20          **Q**     What is it that the UPEA does to ensure that the  
21    voice of the individual members is heard at the administrative  
22    level, or at least at its administrative level?

23          **A**     Currently, we have a seat on the Utah State  
24    Retirement Board. We have a member from our association who  
25    serves in that capacity. We also have two members who serve on

1 the Utah State Retirement Membership Council, and we have an  
2 individual from our retirement district who serves on that same  
3 council. We have two seats on the privatization policy board.  
4 I serve on the Council on Work Force Services, and most  
5 recently we have had a seat on the parking lot situation up at  
6 the capitol, now that we're approaching the legislative  
7 situation we've had a seat on that task force.

8 Q Did you have any involvement on behalf of UPEA in the  
9 discussions that led up to the passage of House Bill 213?

10 A Yes.

11 Q Would you describe for us what those -- what your  
12 involvement was.

13 A The Thursday before the legislative session began  
14 last year in January of 2005, I was called by representative  
15 David Clark who scheduled an appointment with me to discuss  
16 House Bill 213. At the time, I didn't know that's what we were  
17 going to discuss. At the meeting he provided me a protected  
18 copy of the bill.

19 Q And did you take that bill with you?

20 A Yes. I had asked Representative Clark if it would be  
21 all right if I took that bill with me. Our State board met the  
22 next day and I asked him if it would be all right if our state  
23 board were able to look at that bill in executive session.

24 Q At that initial meeting did you express any comments  
25 to Representative Clark in regard to the bill he'd handed you?

1           A     Yes. We spent a few hours talking about it. The  
2 scope of the bill is such that it entails a lot of detail. And  
3 I told him that I really needed to discuss this and present it  
4 to my State board because, you know, from first blush of  
5 looking at the bill it looked like there was a lot to the bill.

6           Q     And did you do that?

7           A     Yes, I did. Our board met the next day, we looked at  
8 the bill in more depth and started looking at it piece by piece  
9 and realizing what a huge, huge impact this bill was going to  
10 have on State employees.

11          Q     Did you have an opportunity to follow up with  
12 Representative Clark or with any committee after you met with  
13 your board?

14          A     We met with Representative Clark on several occasions  
15 to discuss the bill and possible amendments to the bill and we  
16 were also able to present in committee.

17          Q     Did UPEA present any amendments to the bill?

18          A     Yes, we did. We presented amendments to the bill.

19          Q     Were they, to your knowledge, incorporated at all in  
20 any of the iterations of the bill?

21          A     No.

22          Q     Did UPEA ever comment through your efforts to any of  
23 these committees or Representative Clark in regard to its view  
24 of the impact of this bill?

25          A     Yes.

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1           Q     And when did you do that?

2           A     We met with Representative Clark on several  
3 occasions, I do not recall the date.

4                     There were two different committee hearings that UPEA  
5 presented at. We felt that the bill as it was written required  
6 an actuarial study which had not even been commissioned and we  
7 also felt that the actuarial study should not only include the  
8 cost of the entire benefit but also the cost of what  
9 Representative Clark was proposing to see if there was any  
10 significant difference or changes between what the employees  
11 currently have and what House Bill 213 offered.

12          Q     Did you ever specifically ask Representative Clark  
13 for an actuarial study?

14          A     We asked for an actuarial study, we asked about an  
15 actuarial study. We were told that the department of finance  
16 had requested funding for an actuarial study to specifically  
17 look at that benefit.

18          Q     Did you ever receive one?

19          A     No.

20          Q     Did you ever receive any kind of financial  
21 information that showed comparison of the existing program  
22 against what was proposed?

23          A     No.

24          Q     What was your next involvement in the negotiation on  
25 behalf of UPEA in regard to House Bill 213?

1           A     After meeting with the committee on behalf of House  
2 Bill 213, it was voted out of committee and then the bill was  
3 voted on by the house and the senate and then the governor  
4 signed the bill. We had requested an audience with senate  
5 leadership and also with the governor before the bill was  
6 signed, but to no avail, so the bill essentially passed.

7                     After the bill passed, we took it to our membership  
8 body at what we call our general council, it's an annual  
9 meeting we have where delegate representatives of our  
10 membership come before and discuss issues within the  
11 association, and this issue was brought up, along with other  
12 meetings, we held town hall type meetings with the employees,  
13 members and nonmembers.

14           Q     Let me have you take a look, if you would, at  
15 Exhibit 1. Is that a copy of the House Bill 213 that was  
16 passed?

17           A     Yes, I believe so.

18           Q     Take whatever time you need.

19           A     Yes, it is.

20           Q     Is this the program, at least the bill that you  
21 received once it was passed that you considered with the body  
22 of the UPEA?

23           A     Yes.

24           Q     Did it vary in any substantial manner that you're  
25 able to determine from the initial draft that you were

1 provided?

2       **A**     No. I know there were a few amendments during the  
3 session, more technical type of amendments. There was also an  
4 amendment added on calculating the amount of salary for  
5 employees under the new program two.

6       **Q**     In terms of its impact on the sick leave hours that  
7 were accumulated by public employees up through January of  
8 2006, are you aware of there being any changes from what was  
9 originally proposed to you and the final House Bill?

10       **A**     No.

11       **Q**     In regard to the mandatory contribution to a 401(k)  
12 of 25 percent of this accumulated leave, are you aware of there  
13 being any changes made to the original draft to that which was  
14 proposed?

15       **A**     No.

16       **Q**     And in the course of these meetings that you  
17 attended, do you have any recollection of anybody ever  
18 suggesting that in fact House Bill 213 might yield a benefit to  
19 public employees?

20       **A**     No.

21       **Q**     Do you remember any of the discussions that you were  
22 involved in where it was discussed or proposed that in fact if  
23 a public employee was able to retire on January 2nd there might  
24 be some benefit under House Bill 213 as compared to the present  
25 act?

1           A     Yes, I've heard that.

2           Q     In the meetings initially when the bill was  
3 discussed?

4           A     No, I've heard that since.

5           Q     Now, in any of the meetings that you attended or when  
6 you received the final draft of the bill, were you ever told  
7 about any kind of a priority about how accumulated leave at  
8 retirement would be used, whether program two or program one  
9 hours or annual leave or cash in, any discussions about a  
10 priority?

11          A     No.

12          Q     After presenting the proposed language of House Bill  
13 213 to the members of the UPEA, did you receive any kind of  
14 feedback?

15          A     Yes, we did. We received feedback at our annual  
16 meeting and also at the town hall type of meetings that we  
17 held. The feedback that we received was overwhelmingly  
18 supportive of us taking some type of legal action or seeking  
19 some type of injunctive action.

20          Q     How was that feedback received, what mechanism does  
21 the member of the UPEA have to communicate with the board?

22          A     The members can communicate with our board directly,  
23 and the purpose in holding the meetings was to get the  
24 consensus of all of our members. We considered this a big, big  
25 issue and we wanted to make sure that everyone who felt that

1 they were impacted would have a voice, especially in the  
2 decision that our board was making. And our board felt very  
3 comfortable after our annual general council meeting and after  
4 the town hall meetings that we needed to pursue legal action.

5 Q How many members are there presently of UPEA?

6 A Approximately 8,500.

7 Q And of those, is there a number that's retired as  
8 compared to those that are working full time?

9 A Yes, we have 3,500 retired employees who have worked  
10 for the State government at some time, we have approximately  
11 5,000 full time members, 90 percent of those are State  
12 employees.

13 Q Now, the purpose of your general council meeting and  
14 your town meetings was to -- specifically to disseminate the  
15 information related to House Bill 213?

16 A Yes, and to receive input from our membership.

17 Q In your experience as executive director of the UPEA,  
18 have you in the past received proposed legislation or even  
19 bills that had finally been passed and signed as law, been  
20 circulated and feedback sought from the membership?

21 A Yes.

22 Q Is that part of what you normally do in the course of  
23 your business?

24 A Yes.

25 Q I'm curious, as compares to other bills that have

1 been passed that you've circulated and received feedback, have  
2 you ever had any bill that received more feedback, more  
3 negative feedback than House Bill 213?

4 A No.

5 Q And what has the UPEA done to represent the interest  
6 of its membership since receiving this kind of feedback?

7 A What we have done is we have taken into account all  
8 of the differing opinions. This bill impacts individuals in  
9 different ways, and that was specifically the purpose of our  
10 town hall meetings, was to receive feedback from our members  
11 regarding this bill. And then in the meantime what we have  
12 done is retained counsel.

13 Q From the time you first met with Representative Clark  
14 up through the present, have you ever been provided an  
15 actuarial study upon which House Bill 213 was based?

16 A No.

17 Q Have you ever received any sort of a financial  
18 analysis comparing how House Bill 213 operates as compared to  
19 the existing program?

20 A No.

21 Q Have you received any information from legislature,  
22 from an agency of the State that in any way communicated to you  
23 concerns about the fiscal viability of the State in light of  
24 House Bill 213 as compared to the existing program?

25 A No.

1           Q     Was there a body within UPEA that ultimately made the  
2 decision on opposing House Bill 213?

3           A     Yes, our State board of directors.

4           Q     And how often does that board meet?

5           A     They meet monthly.

6           Q     And it consists of how many members?

7           A     It consists of 11 individuals.

8           Q     And that's the entity that ultimately makes the  
9 decision for policy related to UPEA?

10          A     Yes.

11          Q     Is that who you report to?

12          A     Yes.

13          Q     Take a look at Exhibit No. 3, your tab three. Have  
14 you seen that document before?

15          A     Yes.

16          Q     Is that some of the information that you received in  
17 your research and analysis of House Bill 213?

18          A     Yes.

19          Q     What is it your understanding this fiscal note  
20 represents?

21          A     The fiscal note represents what the cost is, and this  
22 was an interesting fiscal note on this type of a bill because  
23 it actually stated that there would be an increase in the cost  
24 of the benefit because of a substantial amount of individuals  
25 who might retire from State government.

1 Q In response to the passage of House Bill 213?

2 A Yes.

3 Q Could you read the final paragraph of Exhibit 3  
4 under, "Individual and business."

5 A "Current employees who have not used their sick leave  
6 in anticipation of using it to purchase health insurance upon  
7 retirement would experience a decrease in the value of those  
8 hours and would not be able to purchase coverage for as long as  
9 they otherwise would be eligible for."

10 Q As part of your responsibilities as the executive of  
11 UPEA, do you do a comparison from time to time of wages paid  
12 public employees as compared to the private sector?

13 A We have commissioned a report from an economist two  
14 years ago and now we commission that on a yearly basis. And  
15 what it is is it's a report of the CPI from the -- excuse me,  
16 from the Bureau of Labor Statistics, it takes into account the  
17 CPI and in the Western States Index and the Wells Fargo Index,  
18 excuse me, what it does is it compares the CPI from those  
19 entities as compared to the COLA that employees have received  
20 and it compared the years from 1980 to present.

21 Q By the way, are you responsible for the safekeeping  
22 of documents at UPEA?

23 A Yes.

24 Q So the records that are accumulated over time in the  
25 course of its research, those are under your --



1           **A**     Yes.

2           **Q**     Would you take a look at Exhibit No. 9?

3           **A**     Yes.

4           **Q**     Is this the study that you're referring to?

5           **A**     Yes.

6           **Q**     Now, is this something that you did in your -- at  
7     least that UPEA did in the course of its responsibilities to  
8     make these comparisons of wages for its members?

9           **A**     Yes.

10          **Q**     And take a look, is this an accurate copy -- without  
11     getting into the substance of it, if you'd just look at all of  
12     Exhibit 10 and make sure that's an accurate complete copy of  
13     it.

14          **A**     Yes.

15          **Q**     Are the conclusions reached in this something that  
16     are utilized in UPEA's representation of its clients to see  
17     that they're being paid as you put it initially consistent with  
18     what they ought to be paid for the service they're providing  
19     the State?

20          **A**     Yes, we have used this report and shared this with  
21     others in State government because we think the findings in  
22     here are so profound as to the compensation that State  
23     employees are making as compared to the CPI and the cost of  
24     living indexes.

25                   **MR. HATHAWAY:** Your Honor, we would offer Exhibit 9.

1           MR. WADDOUPS: We object to Exhibit 9. First  
2 hearsay, second --

3           MR. HATHAWAY: Your Honor, I think respectfully if  
4 it's under 803-6 it's a record that's kept in the ordinary  
5 course and utilized business of UPEA and would respectfully  
6 request that it be received, and I think it's relevant to  
7 establish the disparity -- really the undisputed disparity  
8 between the public sector and the private sector.

9           MR. WADDOUPS: First of all, as to the hearsay issue,  
10 that doesn't solve the problem if they're offering it for the  
11 truth of what's in the report. And it may be a record of the  
12 UPEA, but whether they have this record or not is not at issue.  
13 As to relevance, this is an issue for the legislature to  
14 decide.

15           THE COURT: The objection is sustained.

16           Q     (BY MR. HATHAWAY) Do you have any reason to believe  
17 in your position as the executive director of the UPEA that the  
18 membership does not support the action that's been taken  
19 presently by seeking to enjoin enforcement of House Bill 213?

20           A     No.

21           MR. HATHAWAY: Thank you. That's all the questions I  
22 have, Your Honor, at this time.

23

24

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25

CROSS EXAMINATION

BY MR. WADDOUPS:

Q Good afternoon. I believe you testified that there are approximately 4,500 members of the UPEA who are employed by the State of Utah; is that correct?

A Yes.

Q Is it correct that among those 4,500 members there would be a range of ages?

A Yes.

Q Some would be in their early working years, some nearing their working years; is that correct?

A Yes.

Q In some of those cases, some will be eligible for retirement at present; correct?

A Yes.

Q And many of the members are not eligible for retirement; correct?

A Yes.

Q Is it also correct that some of these members will have accumulated unused sick leave?

A Yes.

Q Is it also correct that some of them may have very few, if any, accumulated sick leave hours?

A Yes.

Q Is it correct that some of your membership will be

1 over age 70?

2 A Yes.

3 Q Do you know how many of your members who are still  
4 employed by the State of Utah are over the age of 70?

5 A No, I don't recall at this time.

6 Q Is it correct that some of your members may be  
7 veterans in the military forces?

8 A Yes.

9 Q Is it correct that some of these members will have  
10 medical benefits available through the Veterans Administration  
11 Association?

12 A Yes.

13 Q Is it true that some of your members may have spouses  
14 who have health insurance coverage?

15 A Yes.

16 Q And is it true in these cases the benefits of unused  
17 sick leave may or may not be of interest to them?

18 A That's possible.

19 Q Now, since you've been involved in this lawsuit  
20 you've had an opportunity to review the interpretation of the  
21 State of House Bill 213; correct?

22 A Yes.

23 Q And you've been at depositions when this has been  
24 discussed?

25 A Yes.

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1           **Q**     Have you had an opportunity to read the deposition of  
2 Debbie Price who explained how it's applied?

3           **A**     I have not.

4           **Q**     Have you had an opportunity to read the State's brief  
5 as to how it's applied?

6           **A**     Portions, yes.

7           **Q**     And do you understand that under some circumstances  
8 House Bill 213 may actually result in more hours of accumulated  
9 sick leave that can be used to be converted to medical benefits  
10 than under the existing law?

11          **A**     Yes, I saw those figures.

12          **Q**     You testified that you were involved in discussions  
13 with Representative Clark prior to passage of House Bill 213?

14          **A**     Yes.

15          **Q**     As I understood you, you also made presentations to  
16 committees; is that correct?

17          **A**     That's correct.

18          **Q**     Which committees did you present to?

19          **A**     The Retirement and Independent Entities Committee.

20          **Q**     And did I also understand you correctly that the UPEA  
21 proposed amendments to House Bill 213?

22          **A**     Yes, we did.

23          **Q**     Is it also correct that the legislature rejected your  
24 proposed amendments?

25          **A**     Yes.

1           Q     Is it also correct that the ideas and your opposition  
2 to House Bill 213 was rejected by the legislature?

3           A     Yes.

4           Q     Is it also correct that you discussed with the  
5 various representatives of the legislature that you believed an  
6 actuarial study was desirable?

7           A     Yes.

8           Q     With whom did you have those discussions?

9           A     Representative Clark, house leadership and senate  
10 leadership.

11          Q     And after these discussions, is it correct that the  
12 legislature proceeded concluding that an actuarial study was  
13 not required at that time?

14          A     No, they funded an actuarial study.

15          Q     To be concluded sometime after the bill was passed;  
16 correct?

17          A     Yes.

18          Q     And they proceeded to pass the bill without the  
19 actuarial study being complete?

20          A     Yes.

21          Q     Are you aware of any legislative requirement that  
22 the legislature have an actuarial study before they can pass  
23 legislation?

24          A     No.

25          Q     Has the UPEA made any effort to advise its members

1 that under certain circumstances House Bill 213 can actually  
2 benefit them?

3 A I don't think we have gotten into those type of  
4 discussions with our members, no.

5 MR. WADDOUPS: No further questions.

6 THE COURT: Any redirect, Mr. Hathaway?

7 MR. HATHAWAY: Yes, Your Honor.

8 REDIRECT EXAMINATION

9 BY MR. HATHAWAY:

10 Q From the time that you first met with Representative  
11 Clark in any of the committee meetings thereafter or any of the  
12 discussions you had afterward with any representatives of the  
13 legislature or their staff, did anyone ever communicate to you  
14 prior to filing this lawsuit that there would actually be a  
15 benefit to some public employees under House Bill 213?

16 A No.

17 Q In any of those meetings or conversations prior to  
18 the filing of this lawsuit was it ever communicated to you as  
19 executive director of UPEA that it would be to the advantage of  
20 any or some of the UPEA membership to retire on January 2nd of  
21 any given year?

22 A No. The decision to retire is very individual and  
23 each person has a retirement date, be it their hire date,  
24 anniversary, or some other date.

25 Q And nobody from the State communicated to you or

1 anybody at UPEA, to your knowledge, that it might be actually  
2 advantageous for an employee to retire on that day?

3 A No.

4 Q Did anyone from the State in any of these meetings  
5 ever communicate to you that it would be maybe better for some  
6 employee to wait for the five years to run from January 1st of  
7 2006 through January 1st of 2011 before retiring to receive an  
8 advantageous treatment under House Bill 213?

9 A No.

10 Q So aside from some of the information you've received  
11 since this lawsuit was filed, advantageous treatment or the  
12 fact that the House Bill may actually benefit some of the  
13 public employees was not information that had been communicated  
14 to you?

15 A No. During discussions, House Bill 213 discussions,  
16 specifically the discussions surrounded the cost, not the  
17 advantage to the employee.

18 MR. HATHAWAY: That's all the questions I have,  
19 Your Honor.

20 MR. WADDOUPS: Nothing further, Your Honor.

21 THE COURT: You can step down. Thank you.

22 Do you want to call your next witness?

23 MR. HATHAWAY: Yes, Your Honor, we'd call Mr. Terry  
24 Ray Yockey.

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00111



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TERRY RAY YOCKEY,

called as a witness by the Plaintiff, having been duly sworn,  
was examined and testified as follows:

THE WITNESS: I do.

DIRECT EXAMINATION

BY MR. HATHAWAY:

Q Mr. Yockey, would you please state your full name for  
the record?

A Terry Ray Yockey.

Q Could you spell that for us.

A Y-O-C-K-E-Y.

Q Thank you. What is your birth date?

A December 11th, 1943.

Q Are you employed presently by the State?

A Yes.

Q Tell us if you would, by way of background, what is  
your education?

A I have a bachelor's degree in sociology and  
psychology from Brigham Young University and a Master's degree  
in social work from the University of Nebraska.

Q Do you presently have dependents?

A Yes.

Q How many?

A I have a 17-year-old daughter and I have a son who is  
20 who is somewhat a dependent at this point still.

1 Q And you're married presently?

2 A Yes, I am married.

3 Q How long have you been employed by the State?

4 A Thirty-four years and four months, I guess.

5 Q When was it -- do you remember the first date of  
6 employment?

7 A July 1st, 1971.

8 Q Which agency did you go to work for?

9 A The agency that is now DCFS, Division of Child and  
10 Family Services.

11 Q Have you been employed by that agency for the entire  
12 tenure of employment with the State?

13 A Yes.

14 Q Your position presently is what?

15 A I am a supervisor of clinical social workers in the  
16 family preservation program.

17 Q In that position do you supervise other employees  
18 within the agency?

19 A Yes.

20 Q And how many?

21 A Eight. Seven presently and I'm one short I'm trying  
22 to hire.

23 Q Do you also provide any sort of instructional  
24 training for other employees within the agency?

25 A Yes.

00113

1           Q     And tell us how frequently that takes place.

2           A     Approximately once every month we give training to  
3 the other employees and then it's done informally on a regular  
4 basis of almost daily in different aspects of the work.

5           Q     Mr. Yockey, what do you consider your compensation to  
6 be for the services you provide the State?

7           A     My compensation is my salary, the annual leave that I  
8 get, the sick leave that I have, the holiday benefits, and  
9 basically that's the mass of the compensation.

10          Q     Would you take a look at Exhibit 4, if you'd lift up  
11 tab 4 in the book in front of you.

12                 I believe, Mr. Yockey, that is a copy of a pay stub  
13 of yours?

14          A     That's correct.

15          Q     Does it reflect on there the compensation you just  
16 identified for us?

17          A     Yes.

18          Q     Let me ask you, what is your present hourly rate for  
19 working with the State?

20          A     \$29.70.

21          Q     And that's reflected down in the lower left hand of  
22 this Exhibit 4?

23          A     That's correct.

24          Q     Under the leave balances section, those are the leave  
25 items that you were referring to that you receive?

1           A     That's right.

2           Q     Let me ask you about annual leave. How is that  
3 earned by you?

4           A     That is accrued at six hours a pay period for 26 pay  
5 periods in a year.

6           Q     Now, are you able to carry annual leave forward from  
7 year to year?

8           A     You're able to carry 320 hours.

9           Q     If you choose to carry your annual leave forward,  
10 what can it be used for?

11          A     It can be used for annual leave in the following  
12 year.

13          Q     Anything else?

14          A     Well, it could be compensated for at the end of my  
15 tenure of employment to be bought out by the State.

16          Q     And I take it annual leave is essentially personal  
17 time, any time that you would like to take off you can use that  
18 leave for that purpose?

19          A     If it doesn't unduly interfere with my employment.

20          Q     Now, after you have accumulated six hours of annual  
21 leave in any pay period, does anything else have to happen  
22 before you can use that, take that time off?

23          A     No.

24          Q     So it's something that's immediately available for  
25 you to use at your discretion?

00115

1           A     That's correct.

2           Q     Now, under sick leave, looking there at Exhibit 4,  
3 how is it that you earn sick leave?

4           A     Sick leave is earned at four hours per pay period in  
5 26 pay periods in the year.

6           Q     And what can you use sick leave for?

7           A     Sick leave is for personal sickness, for doctor  
8 visits, for sickness of relatives where one would have to care  
9 for them, but basically for your own personal sickness and  
10 the -- if you're really -- you're unable to come to work.

11          Q     Can you use it for anything else?

12          A     No.

13          Q     Can you carry unused sick leave forward?

14          A     Yes.

15          Q     And if you carry it forward what can you use it for?

16          A     At the -- you can use it for future sickness or you  
17 can use it for -- to buy insurance with it for the time when  
18 you have reached 65 or also, of course, when you retire there's  
19 480 hours that is taken to cover you between the ages of --  
20 before you retire.

21          Q     After you accumulate four hours of sick leave, are  
22 you able to use it immediately?

23          A     Yes.

24          Q     Nothing else has to happen after you accumulate it  
25 before you can utilize it for any of these purposes that you've

1 described?

2 A No, not really.

3 Q Beneath sick leave is listed converted sick leave.  
4 Can you tell us what the difference is between regular sick  
5 leave and converted sick leave?

6 A Converted sick leave can be accrued if you use less  
7 than 40 hours of sick leave in a given year. So if you use 20  
8 hours in a year then you can accrue 20 hours of converted sick  
9 leave. And that's taken from the bank of your regular sick  
10 leave.

11 Q Is there anything else you can use the accrued sick  
12 leave for?

13 A You can use the accrued sick leave for the purchase  
14 of insurance at the end of your tenure and you can use that  
15 largely as annual leave, if you so desire.

16 Q Now, as of the date of your Exhibit 4, you had an  
17 annual leave of 281 hours?

18 A That's correct.

19 Q Has that gone up from August 26th, the date of this  
20 deposit advice until now?

21 A It's stayed about the same.

22 Q And you have sick leave of 1,585.5 hours?

23 A Yeah, 1581.5.

24 Q Has that gone up at all since August? 00117

25 A Yes, I think it's gone up four hours per pay period.

1           Q     And the converted sick leave, is it the maximum  
2 amount of 320, I take it that's the same?

3           A     That's the same.

4           Q     Now, in regard to this unused sick leave, why are you  
5 personally accumulating unused sick leave in the quantity that  
6 you have here?

7           MR. WADDOUPS:  Objection, Your Honor, as to  
8 relevance, his personal reasons.

9           THE COURT:  Is it relevant, do you think?

10          MR. HATHAWAY:  I think it is, Your Honor, because  
11 every employee has a choice on how they use --

12          THE COURT:  Every employee has a different  
13 circumstance, but I'm going to overrule the objection.

14          THE WITNESS:  I have accumulated that so that I can  
15 use it to buy insurance at the end of my employment so that I  
16 can have insurance coverage when I get 65 because, you know,  
17 obviously Medicare doesn't pay for it all.

18          Q     (BY MR. HATHAWAY)  The unused sick leave, are you --  
19 what are you accumulating that -- I'm sorry, the converted sick  
20 leave, you've been carrying that forward at the rate of 320  
21 hours?

22          A     I've been using that for essentially the same thing,  
23 to buy insurance at the end of my tenure of employment.

24          Q     And it's your understanding that the converted sick  
25 leave can be used like the other unused sick leave to buy that

1 insurance?

2 A That's correct.

3 Q Now, in the course of your employment over the past  
4 25 or so years since the present program has been in effect,  
5 have you attended presentations offered by the Department of  
6 Human Resource Management or Retirement Services or financial  
7 services regarding this accumulated sick leave program?

8 A Yes.

9 Q And is that something that you do on a regular basis  
10 or is that something that's just happened once or twice?

11 A Periodically. I wouldn't say a regular basis but,  
12 you know, more often than regular.

13 Q Is it an annual event for you?

14 A No.

15 Q When was the last time you attended such a meeting?

16 A I attended one in September.

17 Q And the meeting in September, did you discuss the  
18 accumulated sick leave?

19 A Yes.

20 Q Was it communicated to you that it was a benefit to  
21 you as an employee to accumulate rather than use sick leave?

22 A Yes.

23 Q And was that something that was new into the meeting  
24 you went to in September?

25 A No.

00119



1           Q     Did the new changes of House Bill 213 get presented  
2 at this presentation in September?

3           A     Yes.

4           Q     Tell us as best you remember what was presented to  
5 you at this meeting in September.

6           MR. WADDOUPS:  Objection, Your Honor, lack of  
7 foundation, who the person was that was presenting what  
8 position.

9           THE COURT:  That might be nice to know.  Sustained.

10          Q     (BY MR. HATHAWAY)  Tell us what -- you say the  
11 meeting was in September.  What organization was making this  
12 presentation?

13          A     Utah Retirement Association, I guess.

14          Q     And was this a -- to your understanding, a State  
15 agency?

16          A     That's correct.

17          Q     Do you remember the name of the presenter?

18          A     I'm sorry, I don't.

19          Q     Was this meeting that you attended similar to other  
20 meetings presented by this department that you'd attended?

21          A     Yes.

22          Q     Do you have any reason to believe that the person  
23 that presented at this recent meeting was not a representative  
24 of the State?

25          A     No.

1           Q     Were you informed in going to this meeting that these  
2 were representatives of the State?

3           A     Yes.

4           Q     Could you tell us in essence what was explained to  
5 you about House Bill 213?

6           MR. WADDOUPS:  Objection, Your Honor.  The foundation  
7 is inadequate --

8           THE COURT:  You know, let me pause for a minute here.  
9           Was this about retirement or specifically about House  
10 Bill 213?

11          THE WITNESS:  This was about retirement.

12          THE COURT:  So it had nothing really to do with House  
13 Bill 213?

14          THE WITNESS:  That's an aspect of retirement, so it  
15 certainly was brought up.

16          THE COURT:  And you're considering retirement and  
17 that's why you went.  Did you meet with a counselor or was it a  
18 meeting?

19          THE WITNESS:  It was a meeting.

20          THE COURT:  I don't know how helpful this is going to  
21 be.  I'm going to overrule the objection.

22          Q     (BY MR. HATHAWAY)  As best you recall, tell us what  
23 was presented at this meeting you attended in September as  
24 relates to House Bill 213. 00121

25          A     That in order for me to have my -- to be able to use

1 the sick leave to buy the insurance when I reach 65, I would  
2 have to retire before the 16th of December.

3 Q Anything else?

4 A Well, a number of things, but --

5 Q -- related to House Bill 213?

6 A No, that's all.

7 Q This ability that you have, this choice that you have  
8 as an employee to buy sick leave at the rate of eight hours to  
9 one month, is that an important benefit part of your  
10 compensation?

11 A That's a very important part of the compensation.

12 Q If you were to rate that along with the other pieces  
13 of your compensation you talked about, say your salary, your  
14 health insurance, your annual leave, on a scale from zero to  
15 ten, zero being irrelevant, ten being of employment, continued  
16 employment importance, how would you rate this particular  
17 benefit?

18 A Between a seven and eight.

19 Q Now, in regard to the annual leave that you  
20 discussed, you mentioned that you've accumulated approximately  
21 281 hours of the annual leave. On a scale from zero to ten,  
22 how do you rate that benefit, the ability to accumulate and  
23 then cash out your annual leave?

24 A Eight.

25 Q Now, you didn't mention this, but are you offered a

00122

1 participation in a 401(k) plan as part of your compensation?

2 A Yes.

3 Q And is that reflected somewhere on Exhibit No. 4?

4 THE COURT: Probably on the backside.

5 THE WITNESS: Thank you. Yes.

6 Q (BY MR. HATHAWAY) How much is put into your 401(k)  
7 by the State with each of your paychecks?

8 A \$35.64.

9 Q If you consider your 401(k) as part of your entire  
10 compensation package, on the same scale, zero to ten, how would  
11 you rate it?

12 A Between a seven and an eight.

13 Q Now, is it your understanding that under the present  
14 retirement program, that is the program that exists prior to  
15 House Bill 213 going into effect, that you are able to choose  
16 which month of the year that you'd like to retire in?

17 A That's correct.

18 Q And have you made a decision about when it is that  
19 you're planning to retire?

20 A I have made decisions pending the results of this  
21 hearing or the results of this action.

22 Q Had you made a decision before House Bill 213 passed  
23 as to when you wanted to retire?

24 A Yes.

25 Q And when was that?

00123

1           **A**     In April of this coming year.

2           **Q**     Is it your understanding that under the present act  
3 you retired any month without there being any sort of an  
4 economic consequence?

5           **A**     Yes.

6           **Q**     And under House Bill 213, is your understanding that  
7 there could be an adverse economic consequence of when it is in  
8 the year that you retire?

9           **A**     Yes.

10          **Q**     On a scale from zero to ten as we discussed, how  
11 would you rate your ability to choose when it is in the year  
12 that you would like to retire?

13          **A**     Between a seven and an eight.

14          **Q**     As an employee of the State, prior to the  
15 commencement of this litigation had you ever been advised that  
16 you run a potential tax liability by reason of the choice you  
17 had of the use of your sick leave at retirement?

18          **A**     No.

19          **Q**     That's not something that's ever been discussed in  
20 the retirement seminars you've attended?

21          **A**     No.

22                 **MR. HATHAWAY:** If I could have just one minute,  
23 Your Honor.

24                 **THE COURT:** You may. 00124

25                 **MR. HATHAWAY:** Thank you, Your Honor. That's all the

1 questions I have of this witness.

2 THE COURT: Mr. Waddoups?

3 MR. WADDOUPS: Thank you, Your Honor.

4 CROSS EXAMINATION

5 BY MR. WADDOUPS:

6 Q Good afternoon, Mr. Yockey. Do you recall we met at  
7 your deposition?

8 A Yes.

9 Q Let me start with something. I want to make sure  
10 that I heard you correctly.

11 Mr. Hathaway said that you have an understanding that  
12 you could be adversely affected by House Bill 13 and I believe  
13 your answer was yes; is that right?

14 A That's right.

15 Q But the question was could be, correct, could be  
16 adversely affected?

17 A Yeah, that's right.

18 Q Not necessary that you would be adversely affected?

19 A I'd consider could to be part of would.

20 Q But you now know that under some circumstances there  
21 could be absolutely no impact at all on you from House Bill  
22 213?

23 A Yes.

00125

24 Q In fact, at your deposition --

25 MR. WADDOUPS: If I may mark this, Your Honor, as

1 Defendant's Exhibit No. 1.

2 Q (BY MR. WADDOUPS) Do you recall at your deposition  
3 that we marked this exhibit that we've marked as Defendant's  
4 Exhibit No. 1?

5 A I recall seeing it, I -- I assume that's what was  
6 marked.

7 Q And do you recall we went through the different  
8 scenarios displayed in this exhibit at the time of your  
9 deposition?

10 A Yes.

11 Q And have you since your deposition done any checking  
12 to verify whether or not these scenarios display accurately how  
13 House Bill 213 could relate to you?

14 A I checked with the retirement office.

15 Q And in that review did you confirm that in fact if  
16 you were to retire in January of 2006 as opposed to April,  
17 House Bill 213 would have no effect on you at all?

18 A That's correct.

19 Q Now, let me ask you a second question. I thought you  
20 said that you heard at this seminar or this presentation by  
21 someone from the State of Utah that you would lose some of your  
22 accumulated unused sick leave. Did I understand you correctly?

23 A I would lose the benefit of it, some of it.

24 Q And that benefit that you would lose would only be to  
25 the extent that there was a contribution to your 401(k) plan;

1 correct?

2       A     I -- I believe that's correct, if -- I don't claim to  
3 be an expert in that area.

4       Q     Let's be more specific. Did they tell you that under  
5 House Bill 213 you could no longer convert 25 percent of your  
6 unused sick leave to cash?

7       A     That sounds right.

8       Q     That's not something you had ever planned to do, is  
9 it?

10      A     That's correct, I --

11      Q     So you didn't really care or worry about that aspect;  
12 correct?

13      A     That's right.

14      Q     And did they tell you that under certain  
15 circumstances up to 25 percent of your accumulated unused sick  
16 leave would be converted to cash and then made -- the  
17 contribution to your 401(k) plan; correct?

18      A     That is sounds correct, yes.

19      Q     And you now know that the amount of that contribution  
20 can vary depending upon when in the year you choose to retire?

21      A     I have some knowledge of that. I'm not sure exactly  
22 that it's true, but I -- there is some information in that  
23 direction.

24      Q     At least you understand that that's how the State  
25 human resources office interprets the application of the



1 statute?

2       **A**     That's how you said they interpret it, yeah --

3       **Q**     Let me back up and ask just a few other questions.

4 As I understand it, you're still employed by the State of Utah?

5       **A**     That's correct.

6       **Q**     You've made no formal decision as of this point to  
7 retire?

8       **A**     Pending the results of this meeting, I've taken the  
9 steps that I thought needed to be taken in order to retire so  
10 that if the meeting doesn't turn out right I'll retire.

11       **Q**     You've not given notice to the State that you intend  
12 to retire?

13       **A**     No, that would be very unwise to do.

14       **Q**     Yeah. And you've done some investigation as to what  
15 the scenarios would be; correct?

16       **A**     That's correct.

17       **Q**     But you've not taken any -- you've not given notice  
18 or taken any other formal step to require that you retire?

19       **A**     Not that would require that I retire. I've gone  
20 through the steps of getting the information and filling out  
21 the packet and doing all the things I need to do.

22       **Q**     And under the present circumstances you can choose to  
23 retire in December; correct?

24       **A**     That's correct.

00128

25       **Q**     You could choose to retire on January 2nd, correct,

1 of 2006?

2 A That's correct.

3 Q Or you could choose to retire sometime later in 2006;  
4 correct?

5 A That's correct.

6 Q Or you could determine that you wanted to work until  
7 you are age 65; correct?

8 A I don't think I'd last that long, but that's  
9 possible.

10 Q And you will ultimately make the decision on what you  
11 think is the best outcome for you given the circumstances at  
12 that particular point; correct?

13 A That's correct.

14 Q Do you understand that if you were to leave State  
15 employment at this time without retiring you would lose all of  
16 your unused sick leave?

17 A I'm sorry, I don't understand that.

18 Q Do you understand that if you were simply to  
19 terminate your employment or be terminated without retiring you  
20 would lose all of your unused sick leave?

21 A I believe that's correct.

22 Q And you understand that the benefits that are  
23 available to you from unused sick leave only become available  
24 once you formally retire? 00129

25 A Other than the use of it if I didn't get sick, that's

1 correct.

2 Q You can exercise it to take time off if you meet the  
3 requirements for sick leave; correct?

4 A That's right.

5 Q Personal illness, family illness, and so forth but  
6 you understand that you cannot simply decide to convert -- you  
7 can't use your sick leave today without retiring to purchase  
8 insurance in the future, can you?

9 A I wouldn't be that dumb. That's correct. I believe  
10 that's correct. I don't understand it, but I believe it's  
11 correct.

12 Q Is it true that during the 34 years, I think you said  
13 you've worked for the State, that you've never sought  
14 employment in the private sector?

15 A That's not true.

16 Q Have you ever received an offer for employment in the  
17 private sector during the 34 years?

18 A I've investigated different employment possibilities.

19 Q But after your investigation none of that  
20 investigation ever resulted in an offer of employment in the  
21 private sector; is that correct?

22 A That's correct.

23 Q And you've never received an offer that was concrete  
24 in terms of a dollar amount in the private sector; correct?

25 A That's correct.

1 Q And you've never turned down employment in the  
2 private sector so that you could stay employed by the State;  
3 correct?

4 A That's kind of correct, but due to conflict of  
5 interest statutes, there was some employment that I was  
6 investigating that I could not take because -- but it was  
7 part-time employment, not full time.

8 MR. WADDOUPS: I have nothing further.

9 REDIRECT EXAMINATION

10 BY MR. HATHAWAY:

11 Q Mr. Yockey, was this benefit of unused sick leave  
12 that we've been discussing one of the reasons that you chose  
13 not to pursue outside employment from the State?

14 A That's correct.

15 Q Was it -- going back to my scale of zero to ten, how  
16 big of a reason was this one?

17 A Somewhere between seven and eight.

18 Q Now, I want to make sure we clarify one thing. You  
19 were handed Defendant's Exhibit 1 and you looked at that and  
20 you understand that was an exhibit that was presented to you at  
21 your deposition; correct?

22 A That appears to be.

23 Q It's been presented to you in the context of this  
24 litigation?

25 A That's correct.

00131

1           Q     That's not something that you received from the  
2 retirement services people?

3           A     That is correct.

4           Q     And that's not something that has ever been provided  
5 you from any State agency that you've worked with in your  
6 computing benefits upon retirement?

7           A     That's correct.

8           Q     Now, counsel asked you in regard to your decision to  
9 retire what the interpretation was that the State had placed on  
10 House Bill 213. Do you know as you sit here today what the  
11 State's interpretation of House Bill 213 is?

12          A     What aspect of 213?

13          Q     Well, just how they interpret and apply it towards  
14 these retirement benefits that are of concern to you that you  
15 receive as part of your compensation.

16          A     They've said if I don't retire by January 1st I will  
17 lose my benefit -- I will lose a considerable amount of my  
18 benefit as far as the option of buying unused -- buying  
19 insurance with unused sick leave.

20          Q     Now, counsel also asked you about your ability to  
21 choose when it was you retired; right?

22          A     That's right.

23          Q     Now, did I understand you correctly that prior to  
24 House Bill 213 you had made a choice of when it was you chose  
25 to retire?

1           A     I had made a choice, a soft choice but, you know, it  
2 was a choice.

3           Q     And that was April of 2006?

4           A     That's right.

5           Q     And by the same token, you had a choice what to do  
6 depending on the outcome of this case?

7           A     That's correct.

8           Q     Otherwise, you're qualified to retire as you sit here  
9 today?

10          A     That's right.

11          Q     You've met the sort of threshold requirements  
12 necessary to be able to retire?

13          A     That's correct.

14          Q     In the course of your discussions with the State and  
15 the information you received from the State related to your  
16 retirement decision, has anyone communicated to you that the  
17 longer you wait after January 2nd, the more adverse economic  
18 impact House Bill 213 will have on your retirement?

19          A     I believe that was brought out in the discussion that  
20 I had with the retirement office after our deposition.

21                 MR. HATHAWAY: That's all the questions I have.

22                 THE COURT: Okay.

23

24

00133

25

1 RECROSS EXAMINATION

2 BY MR. WADDOUPS:

3 Q One quick follow up, Mr. Yockey. I understood you to  
4 say that after your deposition you met with the counselor at  
5 the retirement office?

6 A I talked to them on the telephone.

7 Q And in that discussion, if I understood what you just  
8 said, they told you that the longer you wait after  
9 January 2006, the greater the adverse impact would be of House  
10 Bill 213 on you personally; correct?

11 A That's a -- it's difficult to quantify in a yes or  
12 no.

13 Q Okay. Well, I'll see if I can make it better.

14 If you retire in January of 2006, I understood your  
15 earlier testimony to be that it would have no effect on the  
16 number of months of medical coverage you could purchase with  
17 your unused sick leave. Is that what you were told by the  
18 retirement office?

19 A That's correct.

20 Q Now, if you decide to wait and retire in January of  
21 2007, did they explain to you that there would be some benefit  
22 to you from House Bill 213?

23 A I have an understanding that that's true.

24 Q The only impact on you from House Bill 213 in terms  
25 of loss of unused sick leave is if you choose not to retire

1 early in the year; correct?

2       A     The retire time that I decide to retire in the year  
3 also affects income taxes and affects a lot of other things and  
4 retirement on January 1st is not convenient to me at this  
5 point.

6       Q     So these are all things that you want to weigh,  
7 whether it's better for you to get more unused sick leave to  
8 purchase medical benefits and retire in January versus all of  
9 the other considerations to retire later in the year; correct?

10       A     That's correct.

11       Q     And that's a personal choice that you will make based  
12 on your unique circumstances?

13       A     That's correct.

14           MR. WADDOUPS: Nothing further.

15                               REDIRECT EXAMINATION

16       BY MR. HATHAWAY:

17       Q     Mr. Yockey, I just want to make sure that I'm clear  
18 on your testimony in regard to the timing of your retirement.  
19 I recognize that you provided information during your  
20 deposition, you've got a copy of that exhibit in front of you,  
21 you've also described a conversation you had with the  
22 retirement office sometime after your deposition. And you said  
23 that you understand or that you have at least received  
24 information that waiting longer may have some benefit to you as  
25 relates to your retirement. Did that come from the deposition



1 and the exhibit that you were provided or did that come from  
2 the retirement office and the discussion you had after the  
3 deposition?

4       **A**     That came from both places, but that's a very  
5 difficult question to answer, you know, because -- but I  
6 will --

7       **Q**     And is that consistent with the information that you  
8 had received in your presentation with the retirement office in  
9 September of this year?

10       **A**     I never received any information about the  
11 January 1st thing previous to the deposition.

12               **MR. HATHAWAY:** Thank you. That's all I have,  
13 Your Honor.

14               **MR. WADDOUPS:** Nothing further.

15               **THE COURT:** Okay. You can step down, Mr. Yockey.  
16 I'm going to take a 10-minute recess.

17               (A recess was taken.)

18               **MR. HATHAWAY:** Robert Anderson.

19                       **ROBERT H. ANDERSON,**

20 called as a witness by the **Plaintiff**, having been duly sworn,  
21 was examined and testified as follows:

22               **THE WITNESS:** I do.

23

24

25

DIRECT EXAMINATION

BY MR. HATHAWAY:

Q Mr. Anderson, would you please state your full name for the record.

A Robert H. Anderson.

Q What is your birth date?

A April 15th, 1947.

Q Tell us, if you would, briefly what your education is.

A I have a Bachelor of Science degree from the University of Utah in business management.

Q You're employed by the State?

A Yes, sir.

Q With what agency?

A It's the Utah Department of Health, Division of Epidemiology and Laboratory Services.

Q What position do you hold?

A Manager of support services.

Q And when did you begin working for the Department of Health?

A December 7th, 1971.

Q For your work that you provide for the State, what is it that you consider your compensation to be?

A An hourly wage, you get sick leave benefits, annual leave benefits, health insurance, life insurance benefits.

1           Q     Take a look at Exhibit No. 5, if you would, it's in  
2 the binder under tab 5.

3                     Is that a copy of your deposit advice?

4           A     Yes.

5           Q     Are the items that you've reflected as part of your  
6 compensation included on this sheet?

7           A     Yes, sir.

8           Q     This was as of July 15th of 2005?

9           A     Correct.

10          Q     And what is your present hourly wage?

11          A     \$25.93.

12          Q     I know that's not -- apparently it was cut off below  
13 on the copy.

14                     Now, are you paid biweekly or are you paid monthly,  
15 how is your pay --

16          A     Pay is every two weeks.

17          Q     And is that uniform with state employees?

18          A     As far as I know, it is.

19          Q     Certainly within the Department of Health?

20          A     Yes, sir.

21          Q     In addition to those benefits you've also got the  
22 leave that's listed down at the bottom?

23          A     Correct.

00138

24          Q     How much sick leave have you accumulated?

25          A     According to this, 1,988. That was as of July 15th.

1 Q Have you accumulated more sick leave since then?

2 A Yes, sir.

3 Q And how is it that you accumulate sick leave?

4 A You accumulate four hours of sick leave for every

5 two-week pay period.

6 Q Have you used any since July of 2005?

7 A No, sir.

8 Q So if we added four hours for every pay period since

9 then, that would reflect what you have presently?

10 A Yes, sir.

11 Q And the converted sick leave, I notice you're at the

12 maximum?

13 A Yes, sir, 320 hours.

14 Q What is your understanding of what you can use that

15 converted sick leave for?

16 A You can use that as sick leave or as annual leave or

17 you can put it in the bank and save it for retirement benefits.

18 Q And you say retirement benefits?

19 A To purchase health insurance at the time of

20 retirement.

21 Q On the same basis you're able to use the unused sick

22 leave?

23 A Yes, sir.

24 Q And then the annual leave, I notice you've got 383.5

25 hours?

00139

1           A     Yes, sir.

2           Q     Is there a maximum amount you can accumulate and  
3 carry forward from year to year?

4           A     You can accumulate 320 hours and carry that forward.

5           Q     And how about your 401(k), do you receive a  
6 contribution from the State?

7           A     Yes, sir.

8           Q     With each pay period?

9           A     Yes, sir.

10          Q     And is that reflected on the Exhibit 5?

11          A     Yes, sir.

12          Q     How much is that?

13          A     The amount of the contribution I guess 111 -- no,  
14 wait a minute. It's \$210.

15          Q     And how much is that per pay period?

16          A     I guess that's -- no, actually that's -- excuse me.  
17 I think that's the part that I put in. I'm not sure what the  
18 State puts in, if it's on here or not.

19          Q     If you take a look at the second page maybe that will  
20 help you.

21          A     The second page? It's got a hole punched in it so I  
22 couldn't tell. I'm sorry.

23          Q     In the second to the column from the right, is that  
24 the contribution per pay period or --

25          A     \$29.54 per pay period.

1           Q     Now, of these benefits that you receive as part of  
2 your contribution, I note in looking at your exhibit that you  
3 pretty much have a maximum allowed of the annual leave and also  
4 of the converted sick leave?

5           A     Yes, sir.

6           Q     What are your plans to use that for?

7           A     My plan was to use that to purchase insurance  
8 benefits upon retirement.

9           Q     That would have been under the old program?

10          A     Yes, sir.

11          Q     Had you made a decision about when it was you were  
12 going to retire?

13          A     I was looking at retiring at age 62.

14          Q     And when would that be?

15          A     About four more years.

16          Q     A particular time of year?

17          A     Didn't have a specific time in mind.

18          Q     And why four more years?

19          A     I would be eligible for Social Security in at 62.

20          Q     Were there other factors that you considered in  
21 determining when it was you wanted to retire?

22          A     No, just you want to have enough money to make ends  
23 meet, you know, upon retirement, so I'd planned that that would  
24 be the best time to do that. If I was forced to retire now I  
25 wouldn't be able to afford to make the house payment and car

1 payment right now so I would need to either seek other  
2 employment or something like that.

3 Q In terms of your own personal retirement were you  
4 anticipating having to seek other employment, was that part of  
5 your plan?

6 A No, sir, it wasn't.

7 Q Have you attended any sort of presentations made by  
8 the Department of Human Resource Management or the Department  
9 of Retirement Systems related to or in preparation for your  
10 retirement?

11 A I did take a retirement class from the retirement  
12 office, but that was some years ago, and I attended a couple of  
13 training sessions on the implementation of House Bill 213.

14 Q When were those trainings?

15 A The one with the retirement office, like I said I  
16 can't remember the date of that, it was quite a while ago, but  
17 the other two were within the last four or five months, the  
18 ones on the implementation of House Bill 213.

19 Q Which agency offered those --

20 A I believe they were offered by DHRM, they were  
21 sponsored by the health department, they came to our office.

22 Q Do you remember the names of any of the individual  
23 presenters at any of those training sessions?

24 A No, sir, I don't.

25 Q Any reason to believe that they were not

00142

1 representatives of the State?

2 A No, sir.

3 Q Did they represent themselves as --

4 A Yes.

5 Q -- representatives of DHRM?

6 In regard to your unused sick leave, describe for us  
7 the kinds of things that you have done in your own employment  
8 for the past 25 years to be able to accumulate the 1,988 or so  
9 hours that you've accumulated.

10 A Well, sick leave has always been an important benefit  
11 to me, the retirement benefit. You would take annual leave  
12 when you are sick or you would come to work sick, you just do  
13 anything you cannot to use the sick leave. There were some  
14 things that you had to use it for, but you try your best not to  
15 use it.

16 Q And why?

17 A Because of the benefit at retirement.

18 Q By "the benefit" are you referring to the  
19 eighth-hour-to-one-month conversion?

20 A Correct, the benefit to purchase the insurance.

21 Q When was it that you first became aware of this  
22 benefit?

23 A I believe it was in 1981 is when the rules kind of  
24 kicked in, I think, to the best of my knowledge.

25 Q And since that time have you attempted to accumulate



1 to be able to avail yourself to that --

2       **A**     Yes, sir, I try to maximize my accumulation of sick  
3 leave.

4       **Q**     When you receive your sick leave you receive an  
5 accrual of four hours per pay period, is it?

6       **A**     Yes, sir.

7       **Q**     And, to your knowledge, is there anything else that  
8 you need to do before you can use your sick leave?

9       **A**     No, sir.

10       **Q**     So as it's accumulated you can --

11       **A**     Well, I believe if you're a new employee there are  
12 some restrictions, but if you've been an employee for a while  
13 you can use it as it's accumulated.

14       **Q**     Have you gone out to receive any additional  
15 information regarding House Bill 213 and how it applies to you  
16 since it was enacted?

17       **A**     I tried to read the law and I've looked at some of  
18 the presentations by the State on their website to try to  
19 understand the implications of the bill.

20       **Q**     In your review of the website presented by the State,  
21 do you recall there being any representation in regard to a  
22 time that would be best for you to retire?

23       **A**     No, sir.

24       **Q**     Was there any representation made on the website or  
25 the information that you received related to there being some

1 kind of a tax benefit to House Bill 213?

2 A No, sir.

3 Q Was there any information on the website related to  
4 your forfeiting your ability to choose to your advantage when  
5 it was you wanted to retire?

6 A No, sir.

7 Q This benefit that you've received over the years to  
8 accumulate your sick leave and convert it to this health  
9 insurance medical care benefit, on a scale from zero to ten,  
10 zero being insignificant, ten being of employment continuing  
11 employment significance, how do you rate this benefit?

12 A I'd rate it as a nine or a ten. It's very important.

13 Q Now, you've mentioned also in regard to the annual  
14 leave that you'd accumulated your intention upon retirement  
15 with that benefit was to cash out?

16 A Yes, sir.

17 Q On the same scale from zero to ten, how do you rate  
18 the ability to accumulate and then cash out annual leave?

19 A Oh, probably a seven or eight, not as important as  
20 the insurance benefit.

21 Q How about the 401(k) program that you participate in,  
22 on the same scale as compared to the other benefits you  
23 received in compensation for the service you provide how do you  
24 rate that?

25 A I'd say about seven or eight also.

00145

1           Q     In determining when -- at least initially when you  
2 determined when it was you wanted to retire, what types of  
3 things did you take into account in making that decision?

4           A     Could you repeat that? I didn't understand it.

5           Q     What did you take into account in making your  
6 decision when it was you wanted to retire?

7           A     I guess the -- your final salary that you're going to  
8 have on retirement, that would include the Social Security  
9 benefit, retirement benefit and the sick leave insurance  
10 benefits.

11          Q     Anything else?

12          A     Not that I can recall.

13          Q     And when you determined originally at least you were  
14 going to retire in April of -- or, I'm sorry, of 2008, those  
15 were the factors that drove that decision?

16          A     I'm not sure where that April date came from. Can we  
17 go back and talk about that a little bit?

18          Q     Well, yeah, let's talk about it. You commenced  
19 employment when?

20          A     December.

21          Q     And you anticipated retiring upon 30 years of  
22 service?

23          A     Correct. Well, not on 30 years of service.

24          Q     I'm sorry, at age --

25          A     At age 62.

1 Q And when is your -- when do you become 62?

2 A That would be April of 2007 or -- I'm not sure --

3 Q In any event, when you were 62 years old --

4 A Yes, sir.

5 Q -- from April of 1947?

6 A Yes, sir.

7 Q And you've explained for us the factors you took into

8 account in making that decision?

9 A Yes, sir.

10 Q Now, is it -- in any of the information you've

11 received from the State on its website or in the training

12 sessions you received from DHR, were you advised that the month

13 in which you retired could have a detrimental effect on the

14 benefits that you'd receive under this unused sick leave?

15 A Yes, sir.

16 Q What were you told?

17 A That if you retire on January 1st then the benefit

18 would be negligible, but if you retire any other time the

19 amount of money that you can put into a 401(k) is limited so

20 that limits how much money can go into the 401(k) and therefore

21 you can use it as sick leave.

22 Q Was there any address -- anything discussed in any of

23 these presentations in regard to use of the annual leave?

24 A For cashout?

25 Q Yes.

00147

1           **A**     Yes, sir. They said you could cash out your annual  
2 leave at your current rate of pay.

3           **Q**     Was there any discussion in regard your use of the  
4 converted sick leave?

5           **A**     Yes, sir, and that was the same factors. You could  
6 cash that out or use that to buy health insurance.

7           **Q**     Was there anything represented to you about the  
8 priority of how each one of those benefits would be liquidated  
9 in the converting of them into this health care benefit?

10          **A**     Not that I can recall.

11          **Q**     Considering this ability to choose when it is you  
12 want to retire, you do have that choice presently?

13          **A**     Yes, sir.

14          **Q**     In fact, under the existing program do you have any  
15 knowledge of whether or not there is a detrimental effect of  
16 the month of the year in which you can retire?

17          **A**     Under the current program?

18          **Q**     Yes.

19          **A**     There's -- you can retire any time you want. Well, I  
20 take that back. You can retire on the 1st and the 15th, they  
21 stipulate those two dates.

22          **Q**     Otherwise, in any month?

23          **A**     Any month.

24          **Q**     And in the scheme of the compensation you receive for  
25 your retirement, how do you rate on the same scale the ability

1 to choose when it is you want to retire?

2 A Very high, that would probably be a nine or a ten.

3 Q And why is that?

4 A Well, you don't have -- there's factors you don't  
5 have control over. You might be sick or you might have  
6 dependents that are sick that would require you to retire at  
7 another time other than January 1st.

8 Q Anything else?

9 A Not that I can recall.

10 Q Do you have dependents presently?

11 A Yes, sir.

12 Q And how many?

13 A One.

14 Q In any of the information that you have received from  
15 the State in evaluating the impact of House Bill 213, have you  
16 been told that there's a potential tax liability risk under the  
17 existing --

18 A No, sir.

19 Q -- plan?

20 In your experience in working in the Department of  
21 Health and the people that work in your division, are you aware  
22 of anyone ever receiving or anyone being assessed a tax upon  
23 the retirement from the program?

24 A No, sir.

25 Q The annual leave benefit that you described for us

1 and your ability to cash that out upon retirement, on the same  
2 scale of zero to ten, how would you rate that benefit?

3 A Seven or eight.

4 Q Let me have you just take a look at Exhibit 16, if  
5 you would, Mr. Anderson.

6 That's a Power Point presentation that was put  
7 together by DHRM addressing some of the issues of House  
8 Bill 213. Is this part of the presentation that you attended  
9 with DHRM?

10 A Yes, sir.

11 Q Power Point presentations --

12 A Yes, sir.

13 Q In anywhere in that presentation, whether it's Power  
14 Point reduction or other conversations, statements made by the  
15 representatives, were you ever told that in fact you may  
16 actually be better off under House Bill 213 than under the  
17 existing plan?

18 A No, sir.

19 Q Were you told that in fact the application of House  
20 Bill 213 would have an adverse consequence on your use of the  
21 accumulated sick leave?

22 A Yes, sir, that's pretty much what was communicated.

23 MR. HATHAWAY: That's all the questions I have of  
24 this witness.

CROSS EXAMINATION

BY MR. WADDOUPS:.

Q Good afternoon, Mr. Anderson. We met at your deposition.

A Good afternoon.

Q Let me ask you about, first of all, the presentation that you have in front of you that's been marked as Exhibit No. 16. Do you still have that open?

A Yes, sir.

Q Do you have the first page in front of you?

A Yes, sir.

Q Do you see the second slide down, the last bullet item where it says, "Comply with IRS rules, giving employees a choice makes all choices taxable," do you see that?

A It's on page one?

Q Page one, second slide on the left, last bullet point in that slide.

A What did you say it said?

Q It says, "Comply with IRS rules, giving employees a choice makes all choices taxable." Do you see that?

A Correct.

Q Earlier, I understand you to testify that no one had ever told you that you might be subject to taxation if you had the choice to convert your unused sick leave to cash?

A Yes, sir.

00151



1           **Q**     You see that presentation point there that seems to  
2 address that very issue?

3           **A**     Yes, sir.

4           **Q**     Does that refresh your recollection that you in fact  
5 were told that that was one of the reasons?

6           **A**     It's on the slide, yes, sir.

7           **Q**     Let me address the second point you just finished  
8 with, which was you believe House Bill 213 has an adverse  
9 impact on you. In giving that answer, do you distinguish  
10 between hours accumulated through the end of 2005 from sick  
11 leave hours accumulated starting in 2006?

12          **A**     Do I distinguish between those?

13          **Q**     Yes.

14          **A**     I have -- no, I was just considering the hours up  
15 until January 1st.

16          **Q**     So you recognize that going forward in 2006 there is  
17 a different treatment of how you can use sick leave hours;  
18 correct?

19          **A**     Yes, sir.

20          **Q**     And at least as you understand your complaint, you're  
21 not complaining about that change; correct?

22          **A**     No, sir.

23          **Q**     Okay. So your concern is about the impact on you  
24 through the hours that will be accumulated through the end of  
25 this year; that is correct?

1           A     Yes, sir.

2           Q     And as you understand that impact, it is, one, you  
3 lose the right to convert a portion of your sick leave to cash;  
4 correct?

5           A     Yes, sir.

6           Q     Now, is it correct, Mr. Anderson, that that was not  
7 something you ever planned to do?

8           A     No, sir, I wasn't planning on doing that.

9           Q     So you don't view that as a significant detriment to  
10 you; correct?

11          A     No, sir.

12          Q     And, in fact, if this bullet point is correct about  
13 the IRS position, would you view it a benefit to avoid that  
14 possible tax liability?

15          A     It would depend -- I'd have to look at all the  
16 numbers.

17          Q     If it turned out that you had to pay tax even though  
18 you chose not to convert your sick leave to cash, that would be  
19 an adverse impact to you; correct?

20          A     I suppose so, yes.

21          Q     And how House Bill 213 in fact benefits you, if it in  
22 fact eliminates that risk?

23          A     Yes, sir.

24          Q     Let me go to the impact on choice of retirement. Is  
25 it true, sir, that you've made no formal decision at this point

1 as to when you will retire?

2 A No, sir.

3 Q I probably asked the question poorly. Have you made  
4 a formal decision as to when you will retire?

5 A No, sir.

6 Q And when you come to make that decision, is it  
7 correct that there will be a number of factors that you will  
8 consider?

9 A Yes, sir.

10 Q And those will include, in essence, how many hours  
11 you may -- what your hourly rate would be over the highest  
12 three years of your salary compensation; correct?

13 A Yes, sir.

14 Q And that's important because that sets the base for  
15 what your retirement compensation would be; correct?

16 A Yes, sir.

17 Q You would also consider whether or not you had  
18 qualified for Social Security benefits; correct?

19 A Yes, sir.

20 Q You would take into account whether there may be some  
21 need in your life for cash at that particular point?

22 A Yes, sir.

23 Q You would also take into account whether or not you  
24 had other employment opportunities that seem attractive to you?

25 A Yes, sir.

1           Q     And all of these are factors that you simply cannot  
2 know at present how they will influence your decision, do you  
3 agree with that?

4           A     Yes, sir.

5           Q     Let me mark as Defendant's Exhibit No. 2 a document.  
6 Mr. Anderson, I've placed in front of you what we've marked as  
7 Exhibit Defendant No. 2. This was marked as an exhibit to your  
8 deposition. Do you recall seeing it before?

9           A     Yes, sir.

10          Q     Do you recall reviewing the various scenarios  
11 presented in that document?

12          A     Yes, sir.

13          Q     And it starts with the accumulated sick leave  
14 balance, which is 2,300 hours assumed across the top of the  
15 page. Do you see that?

16          A     Yes, sir.

17          Q     And you actually have a slightly few more hours  
18 accumulated than that now; correct?

19          A     Yes, sir.

20          Q     And did you study this careful enough to notice that  
21 if you were to retire under House Bill 213 in January of 2007  
22 as opposed to May of 2007, it would impact -- it may have an  
23 impact on the number of sick leave hours you have available to  
24 convert to medical coverage?

25          A     Yes, sir.

00155

1           Q     And, in fact, if you were to retire in May of 2007  
2     that would be -- you would have 216 hours that you could use to  
3     purchase medical leave, do you see that?

4           A     No, sir.

5           Q     That's the second column, HB 213, May 1, 2007 down to  
6     the total months of insurance, if you track it down?

7           A     Yes, sir.

8           Q     And under the current program if you were to remain  
9     in effect you would have 288 hours. Do you see that? That's  
10    the column right next to it, the first column.

11          A     Yes, sir.

12          Q     Is that consistent with your own calculation of how  
13    you would -- you may be impacted by House Bill 213?

14          A     That's assuming that you retire on January 2nd,  
15    correct.

16          Q     Assuming that you --

17          A     Yes.

18          Q     -- it assumes that you may retire in May 1 in one  
19    instance versus retiring in January in the other instance;  
20    correct?

21          A     Yes.

22          Q     Now, do you now recognize that if you were to choose  
23    to retire in January of 2007 as opposed to May, House Bill 213  
24    may have no impact on you at all; is that correct?

25          A     Yes, sir.

1 Q Now, If you were to -- remind us again what age you  
2 would be in May of 2007. I've calculated 60, but --

3 A Sixty, yes.

4 Q Now, and that's the first date upon which you would  
5 be eligible for retirement?

6 A No, sir.

7 Q Are you eligible now?

8 A Yes, sir.

9 Q And is there some significance to you to waiting  
10 until you're age 60?

11 A No, sir, I was going to wait until I was 62, is what  
12 I was planning on.

13 Q If we go over to the third page of Exhibit 2,  
14 Defendant's Exhibit 2, that shows your retirement in the year  
15 2011, if we have done our math right you'd be 64 or 63  
16 respectively in that year; is that right?

17 A Yes, sir.

18 Q Do you see in that -- and I won't walk you through  
19 all of the computations since you've gone through this before,  
20 but under that scenario if you were to retire in January versus  
21 May you would actually end up with 48 more months of available  
22 health care coverage with your unused sick leave under House  
23 Bill 213 than under the current program; is that correct?

24 A Yes, sir.

25 Q And is it correct, Mr. Anderson, at this point it's

1 simply impossible to know whether you would be benefited or  
2 harmed by the application of House Bill 213 at the time you  
3 actually choose to retire?

4 A That's probably correct.

5 MR. WADDOUPS: Nothing further.

6 THE COURT: Thank you. Any other questions,  
7 Mr. Hathaway?

8 MR. HATHAWAY: Yes.

9 REDIRECT EXAMINATION

10 BY MR. HATHAWAY:

11 Q In regard to -- if I could have you focus back on  
12 Exhibit 16. Counsel asked you in regard to the second slide  
13 down from the left in reference to the tax benefit -- that  
14 clearly says what it says --

15 A Yes, sir.

16 Q My question to you was, and I just want to make sure  
17 your answer to counsel was correct, the question was were you  
18 ever told in a Presentation or in any of your conversations you  
19 had with DHRM in the training sessions or with the retirement  
20 services in any of the subsequent conversations that under  
21 House Bill 213 there would be some tax benefit given to you?

22 A No, sir, I don't recall that.

23 Q With regard to the program one and program two hours,  
24 program one being the hours accumulated prior to January 1st of  
25 2006, program two unused sick leave accumulated beyond that

1 time, you don't dispute that the legislature can change  
2 prospectively how accumulated sick leave hours are treated?

3 A That's correct, no problem with them changing.

4 Q Your concern has to do with treatment of the hours  
5 you've already accumulated; is that correct?

6 A Yes, promises that were already made.

7 Q Now, in regard to this tax benefit that counsel has  
8 discussed, and if you want to take a look at Defendant's  
9 Exhibit No. 2, there's a number added in for that tax benefit.  
10 Do you see that in the bottom of the second and third columns?

11 A Is that the very bottom line?

12 Q Yeah, very bottom line, second and third columns.

13 A Yes, sir.

14 Q There are several assumptions made in regard to that  
15 calculation, are there not?

16 A I would assume so. It's the date you retire, isn't  
17 it, is that the assumption?

18 Q No, actually, that's the tax -- potential tax  
19 liability that you're being saved by virtue of House Bill 213.  
20 That's what that purports to represent.

21 A Can you repeat the question, please.

22 Q Okay. Focusing on this tax benefit, that is the  
23 benefit of avoiding the potential tax liability by having the  
24 choice on what you do with the portion of your unused sick  
25 leave upon retirement that counsel talked to you about?



1           A     Uh-huh.

2           Q     That number, and it's a negative number, represents a  
3 potential tax liability under the current program, according to  
4 this document?

5           A     Yes, sir, that's what it says.

6           Q     And there are several assumptions made upon which  
7 that calculation is based?

8           A     I suppose so, I don't know what they are.

9           Q     If you look down at the bottom there's a footnote  
10 four that describes several assumptions. My question to you  
11 is, did you ever see any calculation on how this number was  
12 determined?

13          A     No, sir.

14          Q     Do you have any way of determining independently  
15 whether or not that actually reflects a benefit or a potential  
16 liability to you under the existing program?

17          A     No, sir.

18          Q     And, by the way, the program was enacted by the  
19 State; correct?

20          A     Yes, sir.

21          Q     It's been in effect since 1980, I believe it was  
22 passed?

23          A     1980, '81, something like that.

24          Q     And it has nothing to do with a choice that you made  
25 somewhere along the way in the course of your employment on how

1 to deal with your unused sick leave, did it?

2 A No, sir.

3 Q Now, in regard to the calculations that counsel  
4 showed you in Defendant's Exhibit No. 2, particularly those  
5 relating to the additional months of medical coverage that you  
6 would be able to buy, there are similarly assumptions made in  
7 regard to those calculations; correct?

8 A Yes, sir.

9 Q And one has to do with the month you retire in?

10 A Yes, sir.

11 Q And what is your understanding of the significance of  
12 retiring in January, on January 2nd, for example, rather than  
13 on March 2nd?

14 A You can't put more into your 401(k) than you've  
15 earned, and if you retire on January 2nd you haven't really  
16 earned any money so you can't make any money to be deposited  
17 into a 401(k).

18 Q Now, if, for example, you had accumulated annual  
19 leave and wanted to cash that out would that be treated as  
20 income to you, is that your understanding?

21 A Yes, sir.

22 Q And is that a -- is it reflected any where on this  
23 sheet?

24 A Not that I know of, sir.

25 Q And assuming for the sake of discussion that no

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1 additional program two hours were accumulated by you, that is  
2 no sick leave after January 1st of 2006, might that affect  
3 whether or not you would have an adverse consequence by  
4 retiring on January as opposed to some other time?

5       **A**     Yes, sir, that would affect it.

6       **Q**     Is there any reflection of that in this chart?

7       **A**     Not that I can see.

8       **Q**     This chart, so we're clear, was something that was  
9 provided you at your deposition?

10       **A**     Yes, sir.

11       **Q**     And it's not -- at least the substance of it is not  
12 information that had been previously provided to you by DHRM or  
13 Retirement Services or any other State agency?

14       **A**     That's right.

15       **Q**     And, by the way, if you did retire on January 2nd of  
16 2007, would you be eligible for the Social Security benefits  
17 that you were seeking to receive?

18       **A**     I'd have to do the math. I'm not sure what year that  
19 will be.

20       **Q**     Well, I'm not real good at math. I think it would be  
21 about 60 years?

22       **A**     No, sir, I wouldn't be eligible.

23       **Q**     You were born in '47?

24       **A**     Yes, sir.

25       **MR. HATHAWAY:** That's all the questions I have.

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1 THE WITNESS: Mr. Waddoups, anything else?

2 MR. WADDOUPS: A brief follow-up, Your Honor.

3 REDIRECT EXAMINATION

4 BY MR. WADDOUPS:

5 Q Do you still have Plaintiff's Exhibit No. 16 there in  
6 front of you? It's the slide show, the Power Point  
7 presentation?

8 A Yes, sir.

9 Q I just wanted to make sure that we understood  
10 correctly your recollection. Your testimony was on redirect  
11 that you did not remember being shown or told anything about  
12 potential tax liability. Did we understand you correctly?

13 A Yes, sir.

14 Q Now, in stating that recollection, you're not denying  
15 that the slide that you saw had this presentation on it, are  
16 you?

17 A No, sir.

18 Q And is it also correct that you have no reason to  
19 believe that the State employee did not review each of the  
20 slides with each of the bullet points?

21 A No, sir.

22 Q And is it the situation that the tax liability was  
23 something you simply didn't focus on?

24 A That's correct.

25 Q Now, with respect to the assumptions that show up on

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1 Defendant's Exhibit No. 2 about tax liability, is it correct  
2 that you do pay some federal tax?

3 A Yes, sir.

4 Q And that you expect to continue to be liable for  
5 federal tax at the time you retire in some amount?

6 A Yes, sir.

7 Q And whatever rate you pay federal tax, you understand  
8 that if you were deemed to have received that income you would  
9 pay tax at that rate?

10 A Yes, sir.

11 Q This \$4,000 number may not be exactly accurate for  
12 you, it would be something based on your tax rate times the  
13 value of that benefit at the time of your retirement; correct?

14 A Yes, sir.

15 Q And you understand that that would be a detriment if  
16 the IRS chooses to impose that upon you?

17 A Yes, sir.

18 Q Finally, final area, you testified that you didn't  
19 understand at least that it may make a difference to you --  
20 well, let me back up.

21 I understood you to testify during your examination  
22 that they did tell you it made a difference when during the  
23 year you chose to retire as to your 401(k) contribution; is  
24 that correct?

25 A That's correct.

00164

1           Q     And in terms of making a decision today about when  
2     you would retire or in the future when you retire, you would do  
3     that in light of knowing that implication; correct?

4           A     Yes, sir.

5           MR. WADDOUPS:   Nothing further.

6           MR. HATHAWAY:   One follow-up.

7           THE COURT:    Sure.

8                           REDIRECT EXAMINATION

9     BY MR. HATHAWAY:

10          Q     Reflecting back on the scale from zero to ten we've  
11     been using, now that you understand and you've come to  
12     understand in the course of your deposition and in this  
13     litigation that House Bill 213 provides this benefit of  
14     avoiding a potential tax liability, how do you rate that, zero  
15     being insignificant, ten being a decision that might drive your  
16     continued employment?

17          A     I'd rate it as a five, I don't think I would be too  
18     concerned about it.

19          MR. HATHAWAY:   Thank you.   That's all.

20          THE COURT:    You can step down.   Thank you.   Want to  
21     call your next witness?

22          MR. HATHAWAY:   Your Honor, yes, we would call  
23     Mr. Robert Valerio.

24                           ROBERT RAY VALERIO,

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25     called as a witness by the Plaintiff, having been duly sworn,

1 was examined and testified as follows:

2 THE WITNESS: I do.

3 DIRECT EXAMINATION

4 BY MR. HATHAWAY:

5 Q Mr. Valerio, would you please state and spell your  
6 name for us.

7 A Yes, sir. Robert Ray, V-A-L-E-R-I-O.

8 Q And you're Roe Plaintiff No. 3 in this case?

9 A Yes, sir, I am.

10 Q What is your birth date?

11 A July 26, 1960.

12 Q And I understand that recently you have retired from  
13 State employment?

14 A Yes, sir, I have.

15 Q Tell us, if you would, by way of a little background,  
16 when did you first go to work at the State?

17 A I began my employment in 1978 with the Department of  
18 Social Services and then went to the Utah Department of  
19 Corrections in February of 1986 where I continued my employment  
20 until I retired.

21 Q And you retired when?

22 A August 1st of 2005.

23 Q Mr. Valerio, do you have dependents presently?

24 A Yes, I do.

25 Q How many?

1           A     One child under age, a 15-year-old daughter.

2           Q     Now, what is it ultimately that governed your  
3 decision to retire when you did earlier this year?

4           A     My decision was based on House Bill 213.

5           Q     What in particular about House Bill 213?

6           A     That I would lose some of the benefits that I felt  
7 were promised to me as part of retention of my employment.

8           Q     Tell us what you did, if you would, to make the  
9 determination for yourself to retire in considering House Bill  
10 213.

11          A     Well, in addition to speaking with human resources,  
12 other agents and other supervisors throughout the department,  
13 I -- it was a tough decision, but I did make the decision, you  
14 know, feeling that I'd lose a significant portion of my  
15 benefits if I didn't retire. And I also used calculations that  
16 were provided to us through the human resource department.

17          Q     Is there anything in particular related to those  
18 benefits that you were most concerned about?

19          A     Yes, losing my medical benefits until I was eligible  
20 for retirement benefits, Medicare.

21          Q     Which retirement benefits, your medical benefits,  
22 Mr. Valerio?

23          A     My health care benefits.

24          Q     And is that your ability to convert your unused sick  
25 leave?



1           **A**     Yes, sir, definitely.

2           **Q**     All right. Now, could I have you take a look at  
3 Exhibit 6 in the binder in front of you? That is a copy of  
4 your deposit advice based on your compensation package with the  
5 State?

6           **A**     Yes, it is.

7           **Q**     And if I could have you describe for us, briefly,  
8 what the components were of your compensation while working at  
9 the State.

10          **A**     As my record indicates, I had vision, my Medicare, I  
11 also subscribed to medical, PEHP, dental insurance, also had  
12 some additional life insurance and additional life spouse  
13 insurance and child insurance and some accidental death  
14 insurance through PEHP and the weekly indemnification insurance  
15 and also medical supplement. And I also contributed to 401 and  
16 my 457 along with my UPEA dues, Social Security and Medicare  
17 taxes.

18          **Q**     What about leave?

19          **A**     I was accumulating seven hours of annual leave every  
20 two weeks and I -- well, as of this date, June 17th, I had  
21 accumulated 373 hours.

22          **Q**     I understand that was in excess of what you were able  
23 to carry forward from year to year?

24          **A**     Yes, it is.

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25          **Q**     In the case of your own retirement, how was that

1 annual leave treated?

2 A When I did retire?

3 Q Yes.

4 A I was paid out for that.

5 Q You paid out based on 320 hours or 373?

6 A I was paid out on -- actually, it was a little bit  
7 more, this was June, but I was paid out based on my current  
8 amount of annual leave that I had, which I believe was 402  
9 hours. I could be incorrect, but I believe it was.

10 Q Did you convert that to cash?

11 A The annual leave?

12 Q Yes.

13 A Yes, that's the only choice you have.

14 Q Now, the sick leave, how many hours of accumulated  
15 sick leave did you have when you retired?

16 A Well, on this date I had 1,496 hours.

17 Q Do you remember, is that different from the number  
18 that you had when you retired?

19 A Yes, it is.

20 Q What was the amount that you had when you retired?

21 A Without having my paperwork, I couldn't be specific,  
22 but it was a few more hours.

23 Q Then the converted sick leave you had 320?

24 A Yes, sir, I did.

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25 Q Is that the same number you had when you retired?

1           A     Yes, it is.

2           Q     What did you do with your accumulated sick leave and  
3 converted sick leave?

4           A     I used it for medical benefits for my retirement.

5           Q     What was it that -- let me back up. Did House Bill  
6 213 have any effect ultimately on your decision to retire this  
7 year?

8           A     Yes, sir, it was the sole reason why I retired.

9           Q     Tell us specifically what about House Bill 213  
10 resulted in your decision to retire early this year?

11          A     Based on my calculations I would have lost some --  
12 well, in my understanding, I would have lost substantial sick  
13 leave benefits which would have carried me until I was eligible  
14 for Medicare, and that was a primary concern in my case.

15          Q     In the course of determining that you would lose that  
16 medical coverage until you were able to qualify, what did you  
17 do?

18          A     Could you repeat the question, please?

19          Q     Did you do any research, attend any training sessions  
20 or work with any agencies in making a determination to retire?

21          A     Yes, I did. I used the calculations, the calculation  
22 worksheet what was provided by personnel or human resources  
23 department. I spoke with my immediate supervisors and also  
24 spoke with staff, I guess, it's just a very important decision  
25 that -- it was good and wise to get some other opinions to make

1 sure I was doing it correctly, yes.

2 Q In addition to your talking with your supervisors and  
3 taking a look at the worksheet that was provided you by the  
4 State, were there other factors that came into play in your  
5 deciding to retire?

6 A Work related factors or personal factors?

7 Q Well, anything that would bear ultimately on the  
8 unused sick leave.

9 A On the unused sick leave I was primarily concerned  
10 with maintaining my medical coverage because I had experienced  
11 some health problems in the past and I wanted to make sure that  
12 I had some coverage which would allow me to last until I was  
13 offered some other benefits.

14 Q At your time of retirement, what was your hourly  
15 rate?

16 A At the time of retirement I believe it was 23, 24 per  
17 hour, at the time of retirement. It was 23-something.

18 Q So it had gone up a little bit from what's reflected  
19 on your June 17th statement?

20 A That's correct.

21 Q Was that a cost of living increase?

22 A Yes, it took place in July.

23 Q You mentioned also that you participated in the  
24 401(k) program?

25 A Yes, sir, I did.

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1           Q     Upon your retirement, did you convert any of your  
2 unused sick leave or your converted --

3           A     In order to allow me to retire I purchased some  
4 additional military time that I had, plus I had also  
5 purchased -- converted some additional State time that I had  
6 accumulated from the Department of Human Services into the  
7 public safety retirement, yes.

8           Q     My question was to do with the unused sick leave.  
9 Did you convert any of that and put it into a 401(k) or take --

10          A     Oh, no, definite not, no.

11          Q     You say "definitely." Why?

12          A     I needed the medical benefits.

13          Q     In your calculation of what your potential benefits  
14 were, was it worth more to convert it to sick leave than to  
15 take it in cash?

16          A     Yes, sir, it was.

17          Q     And in any of the calculations of your benefits that  
18 you performed were there any scenarios you came up with where  
19 you might have been better off by continuing your employment?

20          A     No, sir.

21          Q     Any that you might have been better off in converting  
22 any percentage of your unused sick leave into a 401(K)?

23          A     No, definitely not.

24          Q     Or cashing it out?

25          A     No.

1 Q Over the years you were employed by the State, did  
2 you have opportunities to seek work elsewhere?

3 A Yes, sir, I did.

4 Q And did you receive job offers from any other  
5 agencies or other government entities?

6 A Yes, sir, I did.

7 Q You didn't take any of them?

8 A No, sir.

9 Q Why?

10 A I felt that -- well, I wanted to retire with the  
11 State of Utah, I felt that I'd like to have completed 30 years  
12 of service, plus, as I indicated, I also felt that the benefits  
13 offered through the department for medical benefits and  
14 retirement were exceptional benefits and I wanted to be a part  
15 of those programs.

16 Q This unused sick leave benefit program, was that one  
17 that you considered to be a reason to stay?

18 A Yes, sir, it was.

19 Q And you mentioned that you'd originally planned to  
20 work to 30 years before retiring?

21 A Yes, sir.

22 Q When would that have been?

23 A It would have been July of 2008.

24 Q And but for the House Bill 213 passing, that was your  
25 plan?

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1           **A**     Yes, sir.

2           **THE COURT:** Did you retire through the law  
3 enforcement retirement or the regular State retirement?

4           **THE WITNESS:** Law enforcement, sir.

5           **THE COURT:** But that's only 20 years.

6           **THE WITNESS:** That's correct.

7           **THE COURT:** Okay. All right.

8           **Q**     **(BY MR. HATHAWAY)** Going through the worksheet and  
9 calculating scenarios under which your benefits would be  
10 treated in event of your retirement, were you ever informed by  
11 your superiors or representatives of the State of a potential  
12 tax liability under the present unused sick leave retirement  
13 option?

14          **A**     Is that under House Bill 213?

15          **Q**     No, before House Bill 213.

16          **A**     No, I wasn't, I don't recall that.

17          **Q**     And having retired in August of this year, have you  
18 received notice from the IRS that you have a tax liability?

19          **A**     No, I have not.

20          **Q**     Has anyone that you've worked with in preparing and  
21 going through the retirement process, in particular anybody at  
22 the department of retirement services, advised you that you run  
23 the risk of being assessed a tax from the Internal Revenue  
24 Service as a result of your ability to choose under the present  
25 program how your unused sick leave was used?

1           A     Not that I recall, no.

2           Q     As you sit here today, then, you're not aware of some  
3 kind of potential tax liability since you're able to choose the  
4 use of your unused sick leave upon your retirement?

5           A     As part of -- my understanding is part of the bill is  
6 that there was some mention that the converted sick leave time  
7 would be taxed, yes, but I wasn't -- that wasn't mentioned to  
8 me. That was through my own research.

9           Q     Up until the time you retired, had you ever been  
10 informed in the course of preparing for your retirement that  
11 you had a tax liability since you had the ability to choose  
12 what was done with your unused sick leave?

13          A     No, I wasn't specifically advised of that.

14               MR. HATHAWAY: If I could have just a minute,  
15 Your Honor.

16               THE COURT: Uh-huh.

17          Q     (BY MR. HATHAWAY) Mr. Valerio, did the State  
18 withhold any taxes from the money that you received upon  
19 retirement --

20          A     No.

21          Q     -- by reason of this potential tax liability?

22          A     They withheld a lot of money, yes.

23          Q     I'm focusing particularly on this tax liability  
24 arising due to your ability to choose what became of your  
25 unused sick leave. Do you know whether they withheld any money



1 on the basis of that potential tax liability?

2       **A**     No, I do not. I know that I had to pay my 90-day  
3 premium during the interim prior to me receiving any of my  
4 retirement benefits and they taxed me substantially at my  
5 initial payout when I received my final compensation check.

6       **Q**     To your knowledge, did that tax or withholding have  
7 anything to do with potential tax liability for constructive  
8 receipt --

9       **A**     No, it did not.

10       **Q**     -- on benefits?

11       **A**     It did not reflect that at all.

12       **Q**     Good. Now, do you have any knowledge of whether or  
13 not your benefits would have increased under House Bill 213 had  
14 you remained for the full 30 years as you originally intended?

15       **A**     Based on my estimation, my benefits would have  
16 decreased.

17               **MR. HATHAWAY:** That's all the questions I have.  
18 Thank you.

19                               **CROSS EXAMINATION**

20 **BY MR. WADDOUPS:**

21       **Q**     Good afternoon. Let me start, if I can, with  
22 focusing on retirement. As I understand it, you retired  
23 effective August 1, 2005; correct?

24       **A**     That's correct, sir.

00176

25       **Q**     And I believe you testified that it was your plan to

1 work until July of 2008?

2 A Yes, it is.

3 Q That would have been your full 30 years with the  
4 State; correct?

5 A Yes.

6 Q And you actually retired under the 20 year provisions  
7 because you were part of the public safety department; is that  
8 correct?

9 A Well, I had to buy into that retirement because I  
10 didn't have my full 20 years.

11 Q I want to come back and talk about the buying in part  
12 in a minute, but you chose again to retire on August 1;  
13 correct?

14 A Yes, I did.

15 Q And as I understand your testimony, the sole reason  
16 was because of House Bill 213?

17 A Yes, sir.

18 Q Is that your testimony?

19 A Yes.

20 Q There were no other reasons that affected your  
21 decision to retire other than House Bill 213?

22 A No, there wasn't.

23 Q Okay. Now, do you understand that you could have  
24 worked through December 15th of 2005 without experiencing any  
25 impact from House Bill 213?

1           **A**     Yes, I do.

2           **Q**     And yet you elected to retire in August when you  
3 could have worked an additional, what, four months?

4           **A**     Yes.

5           **Q**     And by not working that additional four months, you  
6 gave up approximately ten weeks of additional salary?

7           **A**     Yes, that's correct.

8           **Q**     You also gave up approximately ten additional weeks  
9 of unused sick leave that you could have accumulated; correct?

10          **A**     It would be probably about seven weeks, yes, ten  
11 weeks.

12          **Q**     Seven weeks?

13          **A**     Approximately.

14          **Q**     How many additional hours of unaccumulated sick leave  
15 would you have had if you'd chosen to work through  
16 December 15th?

17          **A**     That would have gave me five months.

18          **Q**     Five additional months?

19          **A**     Correct.

20          **Q**     And yet you chose to retire in August rather than  
21 working through December?

22          **A**     Yes.

23          **Q**     And you understood at the time that you were giving  
24 up those additional five months by retiring?

25          **A**     Yes, I did.

00178

1           Q     And, in fact, in order to retire in August, you had  
2 to, I think you said buy down additional time to qualify?

3           A     Well, it was an interesting -- like I said I had -- I  
4 had 19 years and nine months in public safety, so I had to  
5 convert my Department of Human Services time into the public  
6 safety time which gave me some additional service, plus I also  
7 bought some military time.

8           Q     And you used that option to buy that time down rather  
9 than working an additional five months?

10          A     Yes, I did.

11          Q     Now, is it correct, Mr. Valerio, that at the time you  
12 chose to retire you had an offer of employment with Utah County  
13 Sheriff's Department?

14          A     Yes, sir, I did.

15          Q     And that was the reason you chose to retire in August  
16 as opposed to waiting until December?

17          A     No, sir, it's not.

18          Q     Is it correct that you were concerned that if you  
19 didn't take the offer in August that offer may not be available  
20 to you by the time December came around?

21          A     No, that's incorrect also.

22          Q     Can you explain to the Court why you chose to forgo  
23 the additional five months that you could have achieved if  
24 you'd simply worked through December 15th? 00179

25          A     I felt that I needed to make some preparations in

1 order to accommodate my living style, I'm a single parent and  
2 so I had to make some choices. In order for me to maintain my  
3 employment with the State I would also have to work part time  
4 with the sheriff's office, which --

5 Q Some of it was tied to the offer of employment with  
6 the Utah County sheriff's department?

7 A Not necessarily, no.

8 Q Now, let me ask you to focus upon the adverse tax  
9 consequences. Have you ever sought tax advice as to whether  
10 you owe taxes attributable to the unused sick leave that you  
11 converted to medical care?

12 A No, I have not.

13 Q Ever visited with an accountant?

14 A No, sir.

15 Q Have you prepared your return for this year?

16 A No, I have not.

17 Q Is it correct, then, Mr. Valerio, you don't know  
18 whether or not you'll have to pay taxes on that amount or not  
19 at this point?

20 A That wasn't an issue as part of the calculation.

21 Q Have you filed your tax return?

22 A No, I have not.

23 Q And is it true that you will not know until you file  
24 your tax return whether you are deemed to have constructively  
25 received that income?

1           A     I'm not sure I understand your question.

2           Q     When you file your tax return, I assume it will be  
3 your intent to comply with IRS regulations?

4           A     Yes, it is.

5           Q     And if the IRS regulations require that you pay tax  
6 on the benefit that you converted to medical care, you'll pay  
7 that tax?

8           A     Yes, sir, I will.

9           Q     At the present time you don't know whether or not  
10 that's required or not required?

11          A     No, I do not.

12          Q     Is it correct, Mr. Valerio that your supervisor was a  
13 man named Jim Mower.

14          A     Yes.

15          Q     And is it correct that Mr. Mower has not made any  
16 promises to you about whether sick leave would or would not be  
17 available you to you on retirement?

18          A     Promises, no.

19          Q     And is it correct that you cannot identify a single  
20 individual who has made any promises to you that your  
21 retirement benefits would not be changed?

22          A     A single individual or a single --

23          Q     A single individual. 00181

24          A     Well, in general, it is a consensus of the  
25 department, the people you work with, your supervisors. Yes.

1           Q     That was a consensus of the department based upon  
2 their understanding of the State statute; correct?

3           A     Based on their understanding, that's correct.

4           Q     Based on their reading of the State regulations;  
5 correct?

6           A     Yes, and based --

7           Q     No one has made any unique promises to you that are  
8 separate or different from other -- the rights of all State  
9 employees; correct?

10          A     Of all State employees, no, that's correct.

11          Q     As you've testified, you've already chosen to retire;  
12 correct?

13          A     Yes, I did retire.

14          Q     And since you have retired, you cannot go back to  
15 work for the State?

16          A     No, I cannot. Well, I can, but I wouldn't -- not in  
17 the same capacity.

18          Q     And you have no plans to go back to work for the  
19 State; correct?

20          A     For the State, no, sir, I don't.

21          Q     So in terms of the personal impact upon you, whether  
22 House Bill 213 goes into effect or does not go into effect, you  
23 will remain unaffected?

24          A     No, the House Bill because I retired based on that  
25 decision has already impacted me.

1 Q But you made that decision before this lawsuit was  
2 finalized?

3 A No -- I'm not sure, ask it again.

4 Q The Court hasn't ruled yet as to whether House Bill  
5 213 will go into effect or not, do you understand that?

6 A The bill had already been passed.

7 Q It's been passed but not gone into effect.

8 A My understanding was, yes, it was in effect.

9 Q And you understand it will go into effect in January  
10 of 2006?

11 A That's correct, but it was in effect.

12 Q And that's reason you chose to retire in 2005, is to  
13 avoid the effects of the bill; correct?

14 A It wasn't really a choice. I felt like I was forced  
15 into it.

16 Q But your decision to retire will remain the same  
17 whether the court enjoins the bill from going into effect or  
18 not; correct?

19 A Yes.

20 MR. WADDOUPS: Nothing further.

21 REDIRECT EXAMINATION

22 BY MR. HATHAWAY:

23 Q First, Mr. Valerio, you could, if you chose, go back  
24 to work for the State after a six-month hiatus, couldn't you?

25 A Yes, I can.

00183



1           **Q**     Second, have you ever been paid funds from the State  
2 on which income taxes are due where the State has not withheld  
3 money from your check?

4           **A**     No, they've always withheld money from my check.

5           **MR. HATHAWAY:**   That's all the questions I have.

6           **THE COURT:**   Any redirect? I should say recross. You  
7 can step down, sir. It's about 20 to 5:00. I would think we'd  
8 better call it a day, if that's okay with everybody. I have  
9 something I need to get to this evening. So we'll recess and  
10 I'll see everyone Wednesday morning at 9:00?

11           **MR. HATHAWAY:**   Yes.

12           **THE COURT:**   Thank you.

13           **MR. WADDOUPS:**   We are still planning to go a half a  
14 day on Wednesday, so --

15           **THE COURT:**   Okay. You've got a whole day, so  
16 whatever you want to do.

17           **MR. WADDOUPS:**   Okay.

18

19

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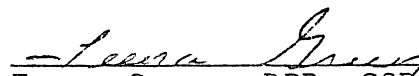
C E R T I F I C A T E

STATE OF UTAH           )  
                             :  
COUNTY OF SALT LAKE )

I, TEENA GREEN, RPR, CSR, do certify that I am a  
nationally certified reporter and a Certified Shorthand  
Reporter in and for the State of Utah.

That at the time and place of the proceedings in the  
foregoing matter, I appeared as the official court reporter in  
the Third Judicial District Court for the Honorable William W.  
Barrett, and thereat reported in stenotype all of the  
proceedings had therein. That thereafter, my said shorthand  
notes of the First Trial Day were transcribed by computer into  
the foregoing pages; and that this constitutes a full, true and  
correct transcript of the same.

WITNESS MY HAND AND SEAL in Salt Lake City, Utah on  
this, the 7th day of November 2005.

  
Teena Green, RPR, CSR

00185

**COPY**

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

Utah Public Employees  
Association and Roes 1-5,  
Plaintiff,

VS.

State of Utah,

Defendant.

CASE NO. 050911548

SECOND HEARING DAY

BEFORE THE HONORABLE WILLIAM W. BARRETT

SCOTT M. MATHESON COURTHOUSE

450 SOUTH STATE STREET

SALT LAKE CITY, UTAH 84114-1860

REPORTER'S TRANSCRIPT OF PROCEEDINGS

NOVEMBER 9th, 2005

REPORTED BY: TEENA GREEN, CSR, RPR

238-7104

00186

1 A P P E A R A N C E S

2  
3  
4  
5 FOR THE PLAINTIFF:

6 BENSON L. HATHAWAY  
7 STEPHEN W. GEARY  
8 KENNETH BIRRELL  
9 KIRTON & McCONKIE  
60 East South Temple, #1800  
P.O. Box 45120  
Salt Lake City, Utah 84145

10  
11  
12 FOR THE DEFENDANT:

13 CLARK WADDOUPS  
14 DAVID C. REYMANN  
15 HEIDI E.C. LEITHEAD  
16 CHEYLYNN HAYMAN  
17 PARR, WADDOUPS, BROWN, GEE & LOVELESS  
18 185 South State Street, Suite 1300  
19 Salt Lake City, Utah 84111  
20  
21  
22  
23  
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00187

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I N D E X

WITNESSES

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E X H I B I T S

Plaintiff's Exhibits 17, 21, 22

Defendant's Exhibit 3

NOVEMBER 9, 2005

9:02 A.M.

P R O C E E D I N G S

★ ★ ★ ★ ★

THE COURT: UPEA and others versus State of Utah,  
050911548. We have the same lawyers present, I assume?

How about this thing filed by Jones-Waldo, have you all taken a look at that? I don't know where we are on it. They filed a petition for limited intervention and motion for public access to injunction hearing. We haven't posted a hearing yet, so I don't know what they anticipate. Somebody want to speak to that?

MR. HATHAWAY: I'd be happy to make a suggestion, Your Honor. In speaking again with Roes Four and Five, Roe Four is willing to go ahead and testify in open court. Since we received a motion last night, last evening late, I would suggest we just proceed and call all of our witnesses. It's not likely since I think we are planning on concluding at noon today that we will be completely finished and it will give us an opportunity to formally respond and maybe address that next Wednesday morning and then put on the final Roe witness according to whatever the Court's ruling is.

THE COURT: Okay. Do you want to come on up and just state your name for the record, please, and if that doesn't

1 give you any heartburn maybe that's what we --

2           **MR. BRYAN:** Your Honor, that's fine. Michael Bryan  
3 on behalf of the media parties, Your Honor. We recognize these  
4 things happen, first. We got word about a possible in-camera  
5 proceeding so we filed this. I'm happy to give counsel a  
6 chance to respond and do it at a better time period, if that  
7 works for everybody involved.

8           **THE COURT:** Well, we have the entire day set aside  
9 next Wednesday so that would be a good time to do it and it  
10 would give everybody an opportunity.

11           Just from my perspective, unless there's some real  
12 compelling reason why this Roe Five is not wanting to show who  
13 he or she is, it's troubling to me that they would be concerned  
14 about retaliation. It seems to me they have a right to file a  
15 lawsuit if they choose and it ought not be held against them,  
16 but we can talk about that later. Okay.

17           **MR. BRYAN:** Thank you, Your Honor.

18           **THE COURT:** Mr. Hathaway, are you ready to call your  
19 next witness, then?

20           **MR. HATHAWAY:** Yes, Your Honor. One housekeeping  
21 matter before in regard to the exhibit list.

22           Exhibit Nos. 17 and 21, 17 being a copy of the CAFR,  
23 which is the state document, I think that can be received by  
24 stipulation.

25           **THE COURT:** Seventeen is received, then.

00190

1 (Plaintiff's Exhibit No. 17  
2 was received into evidence.)

3 MR. WADDOUPS: Just an observation, Your Honor, it is  
4 what it is. We don't have any dispute with that. Our only  
5 concern about it is depending how they want to use it. I don't  
6 think the document just speaks for itself, there may need to be  
7 someone who can come and explain what the intent was and  
8 whether or not it's similar, but it is what it is and the State  
9 obviously is --

10 THE COURT: All right. Well, I suppose when we get  
11 to the point where that may become an issue we can discuss it.

12 MR. WADDOUPS: Yes.

13 MR. HATHAWAY: Twenty-one is also to be received by  
14 stipulation.

15 MR. WADDOUPS: Yes, we stipulate to that one, Your  
16 Honor.

17 THE COURT: Thank you. It's received.

18 (Plaintiff's Exhibit No. 21  
19 was received into evidence.)

20 MR. HATHAWAY: Your Honor, we would call  
21 Ms. Annamarie Andersen.

22 ANNAMARIE ANDERSEN,  
23 called as a witness by the Plaintiff, having been duly sworn,  
24 was examined and testified as follows:

25 THE WITNESS: Yes. 00191



DIRECT EXAMINATION

BY MR. HATHAWAY:

Q Good morning, Ms. Andersen. Would you please state your full name for the record.

A Yes. Annamarie Koch Andersen, just K, middle initial.

Q What is your birth date?

A July 15th, 1953.

Q Are you presently employed by the State of Utah?

A Yes, I am.

Q Would you tell us just by way of background briefly what your education is.

A I graduated from the University of Utah with an accounting degree in 1984. Shortly thereafter, I went to work for the Utah State Tax Commission. My entry level position was a tax auditor position. I was promoted to be a senior auditor a few years later and then in a very short period of time after that a tax audit manager. I work as a sales and use tax audit manager and I've worked with sales and use taxes my entire career.

Q And that career began in what month and what year?

A July 1984.

Q As a tax audit manager, are you in the position where you supervise other employees?

A Yes, I do.

00192

1           Q     How many other employees do you supervise?

2           A     I have five auditors and I supervise two accounting  
3 technicians.

4           Q     In conjunction with your supervisory  
5 responsibilities, do you provide any training or instruction to  
6 these employees?

7           A     Yes, I do.

8           Q     Tell us just briefly what kinds of training and  
9 instruction you give these employees.

10          A     I mentor them, I help them understand the sales and  
11 use tax laws that they're going to administer. Probably most  
12 of you are aware that unlike federal income tax, sales and use  
13 taxes are regulated by the State of Utah, so you don't go to  
14 one of our universities to learn how to administer the sales  
15 and use tax laws of our state. So a lot of my responsibility  
16 through the years is there are a couple other -- well, four or  
17 five sales and use tax managers, there's a big body of sales  
18 tax auditors.

19                I spend a lot of time training auditors, I, of  
20 course, review audit work, I'm very familiar with the statute  
21 and rules that we're enforcing, I'm responsible to be involved  
22 in taxpayers' disputes with our audit findings and to present  
23 the tax commission's -- our side of why we're enforcing this  
24 law or rule. And, you know, of course taxpayers have their  
25 rights to come in and petition and then we go through an

1 appeals process, I am involved in those kind of things.

2 Q For how many years have you been providing these  
3 supervisory and instructional services in the tax department?

4 A When I became a supervisor tax audit manager, and  
5 that would have been in -- I believe right at the very end of  
6 1987.

7 Q In exchange for the services that you provide the tax  
8 commission, what do you receive by way of compensation?

9 A I view my compensation working for the government as  
10 being a combination of my salary and my benefits that are  
11 provided by the state.

12 Q Let me have you take a look at Exhibit No. 7.

13 MR. HATHAWAY: Your Honor, if I could approach the  
14 witness?

15 THE COURT: You may.

16 Q (BY MR. HATHAWAY) This is a book filled with  
17 exhibits. If you could look behind tab No. 7 for just a  
18 minute.

19 Is that a deposit advice reflecting the benefit  
20 package that you receive?

21 A It -- yes, it's showing me my salary part. What  
22 isn't here is on the backside of my pay stub would be a listing  
23 of all of the State-provided benefits.

24 Q All right. Let me ask you, what is your hourly rate?

25 A \$27.38 an hour. Excuse me. I actually have a

1 current copy that has both sides, if that's helpful.

2 Q Perhaps that would be helpful. If we could take a  
3 look at that.

4 A It's in my briefcase.

5 THE COURT: Just go and get it.

6 Do you want to make a copy of the backside?

7 MR. HATHAWAY: That would be great, Your Honor.

8 Q (BY MR. HATHAWAY) While we're waiting, perhaps you  
9 could tell us generally what the components are of the  
10 compensation package.

11 A Clearly the salary that I'm making starting with my  
12 hourly rate, and then when you look at the back side, the State  
13 is paying a number of benefits on my behalf.

14 They're paying in to a dental benefit, they're paying  
15 a health care coverage benefit for a two-party plan. They're  
16 paying all of the different types of taxes that are associated  
17 with State employment so you're going to have workers comp,  
18 things of that nature, the Social Security part of the tax, the  
19 Medicare part of the tax. They're going to be paying -- there  
20 is a one and a half percent amount and it's referred to as a  
21 savings, it goes into my 401(k). A 401(k) is something that  
22 you don't get immediately, that's way out in the future.

23 There's a component that deals with retirement, state  
24 retirement, there's a percentage that goes over to the Utah  
25 retirement systems, and there's a health insurance component on

1 that, and I think there's a long-term disability component.

2 So anyway, there's a lot of parts of those benefits  
3 and they amount to about \$854 of my bi-weekly paycheck. And  
4 then as you can see here, my gross salary pay is \$2,190.

5 Q Let me hand you what we've marked as Plaintiff's  
6 Exhibit No. 2.

7 Is that a current most recent copy of the deposit  
8 advice reflecting your wages and salaries?

9 A Yes, this would be.

10 Q Now, the hourly rate that you previously stated is  
11 the rate that you're presently being paid?

12 A Yes, that's correct.

13 Q All right. Now, are you presently participating in  
14 the 401(k) program?

15 A Yes, I am.

16 Q Do you also accumulate sick leave?

17 A Yes, I do.

18 Q Tell us how that is accumulated.

19 A Okay. I kind of am -- there are some additional  
20 components of compensation and benefits that -- may I take a  
21 moment to talk about -- I think are really important.

22 Q We want to understand the complete package that you  
23 receive for your compensation for the services you provide for  
24 the State.

25 A I receive annual leave, and that's real important to

1 me, that's -- I -- at this point in my career I earn seven  
2 hours a pay period. Sick leave, sick leave is constant and has  
3 been constant since the date I started working for the State.  
4 That is four hours every pay period. So in the course of the  
5 year I'm going to earn 104 hours of sick leave. There is no  
6 maximum limit on sick leave, it just goes on and on.

7           There is a maximum limit on the annual leave, so from  
8 year to year the State allows me to carry over 320 hours of  
9 annual leave. And then I have this category of sick -- it's  
10 referred to here as converted sick leave, and you'll notice I  
11 have 320 hours. What that means is, that's the maximum amount  
12 of converted sick leave the State's allowed me to change from  
13 the nature of sick leave into converted sick leave.

14           Converted sick leave is really -- it's a different  
15 kind of leave than sick leave in that I can use converted sick  
16 leave for anything I want to use it for. For example, if I  
17 wanted to go on vacation, you use it as annual leave, you use  
18 it as -- if I were to leave state employment today the State  
19 would take those 320 hours, multiply that by the hourly rate  
20 and they would pay me for those. So it's kind of like a bank,  
21 a savings account, if you will.

22           And the other option they give me on this converted  
23 sick leave is an option where they have said, if you choose to  
24 leave it there and don't spend it on anything at all, some day  
25 when you retire, I'm going to let you take those 320 hours and

1 go and spend them in this way: You give me eight hours, I'll  
2 give you one month of health care coverage. And that's what  
3 they've told me through all of the years that I've worked for  
4 the State.

5 Q With respect to the annual leave --

6 A Yes.

7 Q -- you receive it at a rate of seven hours per pay  
8 period?

9 A Yes. I started doing that a year ago, because once  
10 you reach your 20 years then that rate of annual leave  
11 increases. So when I started working for the State I believe I  
12 started with four hours per pay period, then increased I  
13 believe at five years, went to five hours, and then -- I  
14 don't -- I don't really remember exactly when it went to six --  
15 actually, I don't think it -- well, maybe it did. I can't  
16 remember. To six hours and then to seven hours.

17 Q Presently you receive seven hours per pay period?

18 A Yes.

19 Q As soon as you receive that at the end of the pay  
20 period, are you able to use it to take time off if you choose?

21 A Yes.

22 Q Nothing else has to happen before that's available?

23 A That's correct.

24 Q By the same token, you can choose to bank it as you  
25 described?

00198

1           A     Right, right.

2           Q     And according to your most recent time sheet, Exhibit  
3 No. 22, how many hours of annual leave are you carrying forward  
4 presently?

5           A     I've got 345 hours and a half hour.

6           Q     That exceeds the amount you're able to carry forward  
7 from year to year?

8           A     Yes, it does. And what --

9           Q     So, essentially, you need to use the 25 hours before  
10 the end of the year or you lose them?

11          A     Right, and I will.

12          Q     Now, in regard to the sick leave, how much sick leave  
13 have you accumulated?

14          A     Well, here you're seeing 1,299 hours.

15          Q     And, in addition, you've got converted sick leave of  
16 how much?

17          A     Three hundred twenty hours.

18          Q     Tell us, over the years, what have you done to enable  
19 yourself to accumulate the number of sick leave hours that you  
20 have?

21          A     I've gone to work a lot. If you'll indulge me for  
22 just a minute.

23                THE COURT: Well, why don't we let Mr. Hathaway ask  
24 the questions. 00199

25          Q     (BY MR. HATHAWAY) Just explain for us if you would



1 the kinds of things that you've done in the course of your work  
2 with the State that has resulted in you being able to  
3 accumulate the number of hours.

4       A     The reason I have been able to accumulate this number  
5 of hours is because I will be using annual leave in lieu of  
6 sick leave. And I've done that throughout my entire career.  
7 I'm not saying I've never used an hour of sick leave, because  
8 obviously I have, but I really have been cautious in the  
9 way I've -- and judicious in the way I've used sick leave.

10       Q     And why is that?

11       A     For me, I view that -- I've done it for two reasons.  
12 One is, obviously you don't know what's going to be in the  
13 future. You don't know if you're going to struggle with some  
14 catastrophic illness, you don't know if you're going to need to  
15 use a whole bunch of hours of sick leave, and especially as you  
16 grow older you've got to have something there as a safety net.

17             And the other reason I've done it is that in the  
18 event I'm able to retire, the State has given me a benefit and  
19 they've called it an unused sick leave retirement benefit.  
20 This is a benefit that I can't access, clearly, until I retire,  
21 but that benefit tells me that when I retire, I could take and  
22 use eight hours of that unused sick leave to buy one month of  
23 health care compensation.

24             Now, the State had some provisions in there that they  
25 required me -- you know, basically there were certain things

1 that I had to do. If I have this bunch of unused sick leave at  
2 the time I retire, they're going to take 480 hours of those  
3 from me, and I understand that. But in return, they're going  
4 to give me up to five hours of paid-up health care coverage.  
5 So those 480 hours to me have always been -- I'm just, in  
6 effect, paying for that benefit.

7 Now, do all State employees pay for that benefit  
8 right now? No, they don't. Just people like me who have a lot  
9 of sick leave and who have been careful in how we've used it.

10 Q Is your ability to bank this unused sick leave  
11 against the contingencies that you've described something  
12 that's important to your employment?

13 A Oh, yeah.

14 Q Is that -- let's just say on a scale from zero to  
15 ten, zero being irrelevant, ten being a decision upon which  
16 you'd base continued employment, how do you rate this benefit,  
17 being able to bank that unused sick leave?

18 A It's hugely important to me. It's between like eight  
19 and ten.

20 Q All right. Now, in regard to the annual leave you  
21 talked about, if you determine to carry that forward every year  
22 what are some of the things that you can do with that? Let me  
23 clarify.

24 A Carrying it forward to how far?

00201

25 Q You mentioned you can use it for personal reasons,

1 vacation, sickness?

2 A Right.

3 Q If you're able to carry it forward until the time you  
4 retire, are there particular uses that are allowed you of that  
5 annual leave?

6 A Yes.

7 Q Under the present program?

8 A Right, yes. What I could do is I could take that  
9 amount and roll over into a 457 account or a 401(k). I  
10 personally don't have a 457 account, so mine would roll into a  
11 401(k). And the point of that is it delays the time in  
12 which -- it postpones when I have to pay all the taxes on that,  
13 is all I'm saying.

14 Q Are there other options that you have presently for  
15 the use of that accumulated annual leave?

16 A I could use it. I mean I could use it all up before  
17 I retired. I'm not quite sure how I would do that.

18 Q Can you cash it out upon retirement?

19 A Oh, yes. The State -- I could take it all in cash  
20 and just get a check from the State.

21 Q Now, is this ability to accumulate and use annual  
22 leave as you've described it, is that an important benefit as  
23 part of your compensation package?

24 A Yes, it is.

00202

25 Q On the same scale, zero to ten, how would you rank

1 that?

2 A It's going to be out around there between eight and  
3 ten. And the reason why is I view that as -- this is my safety  
4 net.

5 Q Have you made a decision, at least provisionally, how  
6 long you plan to work for the State?

7 A I'd like to work until -- at least until I'm 61.

8 Q Is your plan to retire from employment with the State  
9 ultimately?

10 A Yes, I'd like to do that. And I'll be 61 the year  
11 2014.

12 Q As you understand the present program addressing  
13 these unused sick leave retirement option options, does it  
14 affect in any way which month of the year you retire under the  
15 existing program?

16 A I can choose however or whenever I'd like to retire,  
17 but I would retire in a way that would be beneficial to myself.  
18 But because you never know what's going to happen in the  
19 future, I feel like I've got to be able to retire if I needed  
20 to.

21 For example, let's say for some reason when I was 60  
22 and a half I started having really serious back problems so I  
23 couldn't really go to work, and at that point I could retire,  
24 and I would retire a little bit earlier so that I didn't  
25 exhaust my -- that account, that safety account of that sick

1 leave, that unused sick leave.

2 Q So rather than utilize the sick leave for sick leave,  
3 you'd have the option at least of retiring and then converting  
4 it under the present program?

5 A Right.

6 Q Now, based on your experience and to your knowledge  
7 under House Bill 213, do you have the same option to choose  
8 when it is you retire, at least without there being some sort  
9 of an economic consequence?

10 A In order for me to maximize the benefit of being able  
11 to take those hours and buy the -- get that health care  
12 coverage, I'd kind of -- I have to postpone the date when I  
13 retire.

14 The State's kind of worked out a calculation.  
15 They're saying, you don't have any impact or you won't have  
16 much of an impact if you choose to retire at the very first of  
17 the year, January 2nd, because when you're rolling something  
18 into a 401(k), which is this contribution that the State is  
19 going to be making on that 25 percent, there is all sorts of  
20 rules that the IRS governs in terms of how much can go in  
21 there, various things like that. So if you have any -- if you  
22 have any amount of compensation in there, that means that the  
23 State isn't going to be able to roll -- in effect what the  
24 State is saying, put some money in there to block -- or don't  
25 have anything in there so that the State can't roll money in

1 there and that's one way that you can keep using these vacation  
2 hours -- or not vacation hours, excuse me, this unused sick  
3 leave where you can use that to buy eight hours for one month  
4 of health care coverage.

5 Q Well, my question is, is it your understanding under  
6 House Bill 213 that there are economic consequences to which  
7 month of the year that you retire?

8 A There will be.

9 Q And presently there are none?

10 A Right.

11 Q Do you value your ability to choose when it is you  
12 want to retire?

13 A I do.

14 Q Is that an integral part of your compensation  
15 package?

16 A It is, and it is just simply from the standpoint of  
17 I don't know what's going to be in the future ten years out or  
18 nine years out, and so I've got to have a way to protect my  
19 benefits, to protect my life, my livelihood, all of those  
20 different kinds of things.

21 Q On the same scale, from zero to ten, how do you rate  
22 this ability to choose when in the year it is that you retire?

23 A We're going to be up there again. And the reason I'm  
24 giving a range of eight to ten is because my life isn't going  
25 to end if certain things can't happen, I'm going to find a way

1 to make it happen even if I'm terribly inconvenienced, but I'm  
2 not going to die. Okay?

3 THE COURT: We hope not.

4 THE WITNESS: Well --

5 Q (BY MR. HATHAWAY) Ultimately, we're all going to  
6 die, but in reference to --

7 Let me ask you this: You're aware that one of the  
8 reasons given for the passage of House Bill 213 is a  
9 constructive receipt problem under the present program?

10 A Right.

11 Q Now, in the years that you've been in the tax  
12 commission, have any of your associates retired?

13 A Sure. Yes.

14 Q And you've been privy to having worked with people  
15 who've gone through the retirement program over the past 21  
16 years or so?

17 A Right.

18 Q To your knowledge, have any of your associates that  
19 have retired in the past 21 years been assessed tax liability  
20 from the Internal Revenue Service?

21 A No.

22 Q To your knowledge, has the State ever withheld money  
23 from a retiree against a potential liability based on the  
24 constructive receipt rules?

25 A No, no.

00206

1           MR. HATHAWAY: If I could have just one minute,  
2 Your Honor.

3           THE COURT: Uh-huh.

4           You're not eligible to retire until you have 30 years  
5 of service; is that right?

6           THE WITNESS: Yes, that is true.

7           THE COURT: Okay.

8           MR. HATHAWAY: That's all the questions I have of  
9 this witness, Your Honor.

10          THE COURT: Mr. Waddoups?

11          MR. WADDOUPS: Thank you, Your Honor.

12                                   CROSS EXAMINATION

13          BY MR. WADDOUPS:

14           Q     Good morning.

15           A     Good morning.

16           Q     Nice to see you again after your deposition.

17                 Just a few questions to follow up on what you've  
18 testified to. Let me start with your pay stub, your deposit  
19 receipt, Exhibit 22. You've testified that that represents the  
20 benefits paid by the State on your behalf; is that correct?

21           A     Yes, I have.

22           Q     Now, House Bill 213 which is at issue in this lawsuit  
23 does not affect any of those benefits presently; is that  
24 correct?

25           A     Yes -- no -- I mean, it will affect them.

00207



1           Q     It will sometime in the -- it may sometime in the  
2 future affect them; correct?

3           A     Yes, it will.

4           Q     And as of the present date, beginning in January, you  
5 will receive the same benefits as set forth on your stub as you  
6 receive now?

7           A     I'm going to receive those State-paid benefits that  
8 are on the back of the pay stub. Yes, that's correct.

9           Q     Now, with reference to --

10          A     -- and I will receive --

11               THE COURT: Wait a minute. Let him ask the question  
12 and then you can respond.

13          Q     (BY MR. WADDOUPS) With reference to the medical  
14 benefits, that's listed I think as the second item on your paid  
15 benefits on the back; is that correct?

16          A     Yes.

17          Q     And that's shown as a value of \$299 which the State  
18 pays on your behalf?

19          A     Yes, that's true.

20          Q     And that amount is paid every two weeks for each pay  
21 period?

22          A     Yes.

23          Q     So the total in a month is approximately \$300 paid  
24 for State -- the State pays for your medical coverage; correct?

25          A     Yes.

1           Q     Now, on this pay stub you have some handwriting on  
2 the left-hand side on the back. Could you read the first line  
3 that begins I think with PD and translate that into full words,  
4 if you would, please.

5           A     I'm sorry, I'm not understanding where you're asking  
6 me to read.

7           Q     The handwriting under the State messages. First of  
8 all, is that your handwriting?

9           A     Yes, it is. What I'm saying is --

10          Q     Just read what it says. Is that, "paid by State  
11 agencies at time of retirement"?

12          A     Yes. "Paid by State agencies at time of retirement,  
13 administered by DHRM pursuant to State statute." And what I've  
14 got there is that's in reference to the unused sick leave  
15 retirement benefit. That's --

16          Q     That's what I wanted to ask you about.

17          A     Yes.

18          Q     That statement reflects your understanding that the  
19 unused sick leave retirement benefits only becomes available to  
20 you, if at all, at retirement; correct?

21          A     That is right.

22          Q     And the number of hours that you have accrued is  
23 approximately 1600 as of the present date; correct?

24          A     Yes, that is true.

00209

25          Q     And you understand that you will continue to have

1 those same 1600 accrued hours after January 2006 when House  
2 Bill 213 goes into effect; correct?

3       **A**     Yes, I do.

4       **Q**     And nothing in the present legislation takes away or  
5 removes any of those accumulated sick hours; is that correct?

6       **A**     That's true.

7       **Q**     You also have written, "Pursuant to State statute"?

8       **A**     Yes.

9       **Q**     Is it correct that you understand that this benefit  
10 of unused sick leave is made available to you pursuant to  
11 statute?

12       **A**     Yes, I do.

13       **Q**     You have no separate private contract with the State  
14 of Utah that's different from any of the other State employees;  
15 is that correct?

16       **A**     To the best of my knowledge, I think that's correct.

17       **Q**     Now, with respect to House Bill 213, I would like to  
18 discuss with you your understanding of how House Bill 13 will  
19 affect you.

20               Do you have an understanding that under House Bill  
21 213, you will continue to be able to convert your unused sick  
22 leave at the rate of eight hours for one month of health  
23 coverage?

24       **A**     Yes.

00210

25       **Q**     And if you retire from State employment that benefit

1 will be available to you?

2 A Yes, it will.

3 Q Now, the one change from House Bill 213 is that under  
4 present law you can convert up to 25 percent of those hours to  
5 cash?

6 A That's right.

7 Q And have you ever personally considered taking cash  
8 in lieu of the medical coverage?

9 A No.

10 Q But you would have that option under the present law;  
11 is that correct?

12 A That is true.

13 Q And based on your accounting and tax background, you  
14 understand that that creates some risks for you with respect to  
15 the IRS; correct?

16 A In terms of how I take the benefit, there could be  
17 some risk to that.

18 Q If you --

19 A If I take it as cash, I understand that I'm going to  
20 be paying income taxes on it, FICA taxes, whatever --

21 Q Right.

22 A -- associated with that.

23 Q If you were to take it in cash, you may have to pay  
24 the tax liability for the receipt of that income; is that  
25 correct?

00211

1           **A**     That is true.

2           **Q**     And do you also understand that under the Internal  
3 Revenue Service regulations, they may treat that as the  
4 constructive receipt of income?

5           **A**     I understand that they may do that, but may and  
6 whether they will -- they don't do it currently.

7           **Q**     They have not --

8           **A**     They have not done it currently --

9           **Q**     -- to the best of your knowledge?

10          **A**     -- they may do it in the future, and I am willing to  
11 accept the consequences of that if they do that in the future.

12          **Q**     So if it were up to you, if you were allowed to make  
13 the policy, you would take the risk that the IRS will not  
14 enforce this regulation; is that correct?

15          **A**     Yes.

16          **Q**     However, you recognize that the State of Utah has an  
17 interest in whether or not this risk should be incurred by its  
18 employees and itself; correct?

19          **A**     The way I recognize this is that it is -- it's  
20 actually less expensive for the State of Utah to provide a  
21 contribution to a 401(k) plan, and the reason why it is is if  
22 the State provides a contribution to a plan is that the State  
23 doesn't have to pay any FICA taxes on that, that's your Social  
24 Security taxes. If the State pays me that or gives me that as  
25 compensation or cash, then the State is required to pay the

1 FICA taxes on that. So to the State it's less costly for them  
2 to do contribution than it is to do the -- than to pay out.

3 So if -- I see that change as, yes, it may be very  
4 beneficial to individuals depending on what their own  
5 circumstances are, but it's really more beneficial to the State  
6 of Utah not to have that be paid out but rather to make it as a  
7 contribution, because you have that -- right off the bat you've  
8 got that savings of those Social Security FICA taxes.

9 Q And I didn't make my question very clear, so let me  
10 see if I can redirect it.

11 You understand that whether to take the risk that the  
12 IRS will enforce its regulations is a decision that not only  
13 affects the employees but also affects the State of Utah;  
14 correct?

15 A Yes, I do.

16 Q Because the State would have to make a decision as to  
17 whether or not it should withhold taxes on the constructive  
18 receipt of income; correct?

19 A Yes.

20 Q And if the IRS determines that it's going to enforce  
21 the regulation, there is a risk to the State for penalties for  
22 not withholding; correct?

23 A Yes, that would be true.

24 Q And do you recognize that this is a legitimate issue  
25 for the legislature to have addressed?

00213

1           **A**     Yes, I believe it is.

2           **Q**     Now, let me go to the second change from  
3 House Bill 213. As a result of converting or taking away the  
4 option of converting it to cash, the State then mandated that  
5 25 percent of the unused sick leave would go into the 401(k)  
6 plan; is that correct?

7           **A**     Yes, they do.

8           **Q**     I think that's what you were explaining earlier, that  
9 some portion of these unused sick leave hours can go into the  
10 employee's 401(k) plan?

11          **A**     Right.

12          **Q**     And those hours are converted at employee's rate of  
13 pay at the time of retirement; correct?

14          **A**     Yes.

15          **Q**     Now, is it correct that as to the program one,  
16 program two -- excuse me, the program one hours, the hours that  
17 you've accumulated to date, those are the only changes that  
18 come about as House Bill 213?

19          **A**     There is one additional change, and I'm not sure why  
20 this isn't brought out as clearly in all of the information,  
21 and that has to do with the converted sick leave. That  
22 converted sick leave, to me, I own that, I could spend that  
23 however I want to. And with this new provision, the State is  
24 going to require me to roll 25 percent of those 320 hours that  
25 I may not want to roll.

1           Q     And that's --

2           A     And that's part of my concern. And it's a big deal,  
3 because I've operated under the assumption for many years that  
4 I actually own that, those 320 hours, that they belong to me.  
5 And if I should die before I can reach retirement age, I want  
6 that to be there as cash for -- you know, either to put me in  
7 the ground or for my son to have it, to have that be part of my  
8 estate. That's really important to me.

9           Q     Let me back up and ask you, with respect to the 320  
10 hours of converted sick leave --

11          A     Yes.

12          Q     -- what is your understanding as to how you can use  
13 that?

14          A     I can use that -- I can use it as annual, I can use  
15 it as -- if I left state employment today or if I died before I  
16 could retire, I understand that the State would pay me for that  
17 just like they pay me for annual leave.

18          Q     Now, do you have an understanding as to how that is  
19 changed by House Bill 213?

20          A     My understanding is that starting January 1st of  
21 2006, this 320 hours -- yes, I can use them, I can spend them  
22 all, but I've spent many years trying to accumulate them, but I  
23 won't be able to -- if I needed to have those turned into cash,  
24 I wouldn't be able to do that. That's what I'm understanding.

25          Q     Okay. Now, let me move forward, now. One of the



1 changes that you said you understand is that under House Bill  
2 213 at the time of retirement, 25 percent of your hours roll  
3 into the 401(k) plan; is that correct?

4       **A**     That's correct.

5       **Q**     You can also satisfy that roll into the 401(k) plan  
6 for other sources of income; correct?

7       **A**     Yes, and in this case the other sources of income,  
8 the only sources that I understand that I can actually roll  
9 into a 401(k) would be that annual leave or any leaves that the  
10 State is paying out to me at the time of retirement.

11       **Q**     Let me walk you through each of them. So, for  
12 example, you could make a choice at the time of retirement --  
13 and, by the way, let me withdraw that question and back up so  
14 we've got the context correct.

15               What year would you first be eligible for retirement?

16       **A**     The way I understand, in the year 2014, since my  
17 birthday is in the middle part of July, I believe the first  
18 time I could retire would be August --

19       **Q**     August of the year 2014?

20       **A**     Or on my birthday. I think there's only two times of  
21 the month that you can retire, the middle of the month and the  
22 very first of the -- the first of the month.

23       **Q**     So you have approximately nine more years?

24       **A**     Yes.

00216

25       **Q**     Before you would be eligible for retirement?

1           A     Yes.

2           Q     What age would you be at the time you're first  
3 eligible to retire?

4           A     Sixty-one.

5           Q     And you could choose to work longer for the State if  
6 you thought that was in your best interest; correct?

7           A     I could.

8           Q     Okay. Now, between now and the year 2014 when you  
9 first become eligible, you understand that you will continue to  
10 accrue sick leave?

11          A     Yes.

12          Q     And those will be under what the House Bill 213  
13 calls program two hours; correct?

14          A     Right.

15          Q     So in addition to annual leave that can be rolled  
16 into your 401(k) plan do you understand that your accumulated  
17 sick leave as program two hours can be rolled into your 401(k)  
18 plan?

19          A     Yes.

20          Q     And, in fact, do you understand that under the  
21 State's current practice those hours would be first -- the 25  
22 percent will be first deducted from the program two hours  
23 before there was any impact on program one hours?

24          A     I'm not sure that I know that, because I'm not sure  
25 that I've seen anything in rules or in the statute.

1           Q     You understand that that's what the HR people from  
2 the State are now saying the practice will be?

3           A     I -- I will take your word for it.

4           Q     At least you don't have any information that that's  
5 incorrect?

6           A     No, I don't.

7           THE COURT: Let me just clarify this. So when you're  
8 talking about program one hours, you're talking about the 320  
9 converted hours, is that what you're talking about?

10          Q     (BY MR. WADDOUPS) No, the program one hours would  
11 be, if you understand this correctly, the 1600 hours that's  
12 accumulated to date; correct?

13          A     No, and that is the problem. What they've done is  
14 they've taken the --

15          THE COURT: Well, answer his question.

16          THE WITNESS: Pardon me. I'm sorry.

17          Q     (BY MR. WADDOUPS) Under the House Bill 213, what is  
18 categorized as program one hours is all of the accumulated  
19 hours you have through the end of the year 2005; correct?

20          A     Yes, converted and sick leave.

21          Q     So in your case that would be approximately 1600  
22 hours?

23          A     Yes, that would be.

24          Q     And the program two hours would be the accumulated  
25 sick leave that you incur after the end of 2005; correct?

1           A     Yes.

2           Q     So in between now and the time when you become  
3 eligible for retirement the 25 percent would first come out of  
4 your program two hours?

5           A     Okay.

6           Q     And if there were sufficient program two hours to  
7 satisfy the full 25 percent, at that point there would be no  
8 impact at all on your program one hours; is that correct?

9           A     I'm not understanding it to be that way. I'm  
10 understanding it to be that they're going to take 25 percent of  
11 whatever happens to be in the program two hours and then once  
12 again taking 25 percent out of what happens to be in the  
13 program one hours.

14          Q     And from whom did you obtain that understanding?

15          A     Myself.

16          Q     Okay. Now, if your understanding is incorrect and  
17 they take the full 25 percent out of your program two hours, at  
18 the time of retirement that change will have no impact on your  
19 1600 hours in any respect; is that correct?

20          A     That's correct. But what you're asking me to do is  
21 you're asking me to, once again, really sacrifice over the next  
22 nine years so that I make sure that I have at least 25 percent  
23 of the total of whatever is going to be out there so that I  
24 don't have any impact on those 1600 hours. So in effect, I  
25 mean really you are asking me to sacrifice again to build up a

1 whole cache of sick leave to have this whole cache of sick  
2 leave in program two. Now, I -- I hope that I'm going to be  
3 able to do that, but what if I'm not?

4 Q And the fact is, as of the present date you have no  
5 way of knowing whether or not House Bill 213 will in fact  
6 impact your 1600 hours in any respect?

7 A It impacts me in this way. When I started working  
8 for the State, I started working for the State under -- you  
9 call them program one, I call them an unused sick leave  
10 retirement benefit. Retirement means something to me. From  
11 the standpoint of just general the meaning of words, retirement  
12 means something that -- I know you asked me, Did anybody ever  
13 say to you that this retirement program would continue? And  
14 I -- it really impacted me because I thought, I don't think  
15 fast enough on my feet to really tell you, but as I thought  
16 about it later, this is the problem with this, you --

17 THE COURT: Well, there's no pending question that  
18 addresses what you want to say. I don't want to cut you off  
19 because you have a story to tell, but he has a right to ask you  
20 questions.

21 Q (BY MR. WADDOUPS) And my question is simply today,  
22 there are many things that could happen such that you cannot  
23 know today whether or not you will in fact be impacted in any  
24 way as by House Bill 213; is that correct?

25 A Absolutely.

00220

1           Q     In fact, you could be terminated in your employment;  
2 correct?

3           A     I am really a good employee.

4           Q     I'm sure you are.

5           A     I could be terminated --

6           Q     But for reasons none of us can predict, for some  
7 reason you may decide to leave or be asked to leave your  
8 employment; correct?

9           A     That is true.

10          Q     And if that were to happen, you would not have any  
11 benefit from the 1600 hours; correct?

12          A     But you took the 320 from me.

13          Q     All right. Now, with respect to -- you could decide  
14 to take employment someplace else; correct?

15          A     That is true. And if I did, I don't want you to take  
16 the 320 from me.

17          Q     And you believe that House Bill 213 somehow affects  
18 those 320 hours?

19          A     I do.

20          Q     Okay. Now, under the present law, if you were to  
21 leave employment you cannot convert any of that to cash,  
22 correct, other than except that retirement?

23          A     And if I left State employment.

24          Q     Now, let me ask with respect to your sick leave, you  
25 said that it's important to you to be able to preserve to

1 retire because you may have a back injury, I think was your --  
2 and may need to take time off. Under the existing law you have  
3 1600 hours accumulated; correct?

4       **A**     Yes.

5       **Q**     And that translates into, what, approximately 200  
6 days that you could take off as sick leave for an injured back?

7       **A**     It would.

8       **Q**     And under the existing law, you could take almost a  
9 full year off and get paid full salary; correct?

10       **A**     I haven't done the calculations. I'm going to rely  
11 on yours, yes.

12       **Q**     Two hundred work days, approximately; is that  
13 correct?

14       **A**     Yes.

15       **Q**     I assume that you would consider that a significant  
16 benefit?

17       **A**     Yes, it is.

18       **Q**     And under House Bill 213, that same benefit is  
19 available to you; correct?

20       **A**     Yes, it is.

21       **Q**     If sometime between now and the time of retirement  
22 you needed to take that almost full year off and used up your  
23 1600 hours, you would have no extended benefits from retirement  
24 for medical coverage from the 1600 hours; correct?

25       **A**     I think because of the way retirement works, and we

1 do have, and I don't know if this is true, there is a 25-year  
2 period where I could actually retire with 25 years of  
3 employment and I could buy myself out, I could buy five years.  
4 And if I thought that it made sense to buy those five years to  
5 retire early so that I wouldn't lose those 1600 hours, I think  
6 I'd do that.

7 Q And that's all the decision that you'd have to make  
8 in the future; correct?

9 A Yes.

10 Q Do I take a year of sick leave and get paid full  
11 salary, one option, or do I choose to retire?

12 A Yes.

13 Q And that's something that would have to be governed  
14 by the circumstances at the time you faced that issue?

15 A Yes.

16 MR. WADDOUPS: Just one moment, Your Honor.

17 THE COURT: Uh-huh.

18 MR. WADDOUPS: Nothing further, Your Honor.

19 THE COURT: Mr. Hathaway, redirect?

20 MR. HATHAWAY: Yes.

21 REDIRECT EXAMINATION

22 BY MR. HATHAWAY:

23 Q Let me clarify one thing, Ms. Andersen. In regard to  
24 the 320 hours you're referring to, you're referring to the  
25 converted sick leave hours?

00223



1           **A**     Yes.

2           **Q**     And the 320 is the maximum per year you're able to  
3 carry forward?

4           **A**     Yes.

5           **Q**     You were talking about a problem that you believed  
6 existed in the retirement options as they were explained by  
7 counsel. Would you describe for us as briefly as you're able  
8 what problems you see for yourself in evaluating retirement  
9 options as they've been represented by counsel.

10          **A**     I think what the State's asking me to do is really to  
11 sacrifice again over the next nine years of trying to, once  
12 again, accumulate a pile of sick leave so as not to -- so as to  
13 have those 25 percent of hours not dilute the value of those  
14 1600 hours so that they can be used to buy -- the eight hours  
15 to buy the health care coverage.

16          **Q**     How is it that House Bill 213 dilutes, as you put it,  
17 the value of the sick leave and converted sick leave that  
18 you've accumulated through the present?

19          **A**     I'm not really sure how to answer that question.  
20 It's just that now I'm having to do some additional -- make  
21 some additional sacrifice in order to not dilute them so that I  
22 can keep those 1600 hours in place.

23               **THE COURT:** She needs to clarify what she means by  
24 "sacrifice." What do you mean by "sacrifice"?

25               **THE WITNESS:** I'm really wanting to preserve the

1 1600 hours of sick leave to buy that health care when I'm at a  
2 point in my life when I think health care is very important to  
3 me. It took me a lot of work to accumulate these hours. And  
4 by that what I'm saying is that I have used annual leave -- to  
5 accumulate this number of hours, you just don't do that in a  
6 day.

7 THE COURT: Over the next ten years would you also  
8 attempt to accumulate more than just what you presently have?

9 THE WITNESS: What the State's saying to me now is  
10 that to preserve those 1600 hours, which I really want to  
11 preserve, if I accumulate more because they have to roll in  
12 25 percent of hours at -- and it's a 25 -- it's 25 percent of  
13 the 1600 hours that I'm trying to preserve, it's 400 hours.

14 So if I -- if I -- as I'm understanding this this  
15 morning, if I don't use sick leave now over the next nine  
16 years, I'll make sure that I have -- the two combined, the two  
17 numbers of hours combined since the State will only take 25  
18 percent of them that that's a way of protecting those 1600  
19 hours. And so they're asking me to do that, and I'd be willing  
20 to do that if you could guarantee me that you're not going to  
21 be changing program two before I reach age 61. And --

22 THE COURT: Okay. That I'm satisfied with --

23 Q (BY MR. HATHAWAY) Let me just ask, you talked about  
24 the 25 percent. Now, under the present act are you required to  
25 pay 25 percent of your accumulated unused sick leave and put it

1 into a 401(k)?

2       **A**     No.

3       **Q**     So that's a new provision under House Bill 213?

4       **A**     Right.

5       **Q**     And do you have any discretion in that, that is you  
6 as the employee?

7       **A**     No -- I mean I do have discretion, I don't have to  
8 take 25 percent.

9       **Q**     Now, my question is under House Bill 213, do you have  
10 any discretion on whether or not you get a 25 percent  
11 contribution to your 401(k)?

12       **A**     I don't have discretion.

13       **Q**     Now, you have discussed that it is your understanding  
14 that there would be 25 percent taken from your unused program  
15 one sick leave, 25 percent taken from the converted sick leave,  
16 and 25 percent taken from the program two sick leave in coming  
17 up with that 25 percent mandatory contribution?

18       **A**     Yes, that's how I was understanding that and --

19       **Q**     And what is your understanding based upon?

20       **A**     Myself and maybe --

21       **Q**     And what did you read?

22       **A**     I guess as I read the statute that's the way I was  
23 reading it.

24       **Q**     Did you read any rules related to the statute?

25       **A**     I have not.

1           Q     Now, the statute is not in effect yet, is it?

2           A     No.

3           Q     And counsel referred to the present practice, the  
4 present practice of applying. There is no present practice, is  
5 there, because it's not in effect, to your knowledge?

6           A     No, there haven't been any rules that have been  
7 distributed out that I am aware of, or at least I haven't  
8 received any so that I can actually read them and try to sort  
9 out or figure out what they might be.

10          Q     Counsel asked you in regard to whether or not the  
11 State might have a penalty imposed by reason of it not  
12 withholding money under the constructive receipt rules. Do you  
13 have any familiarity with federal immunity or state immunity in  
14 the event of federal taxation, is that something you deal with?

15          A     No, I don't.

16          Q     So you wouldn't know whether or not the State is  
17 immune from paying penalties pursuant to the --

18          A     I don't.

19          Q     In response to questions of counsel and focusing on  
20 your use of your accumulated unused sick leave, you said that  
21 you've never considered a cashout option. Why?

22          A     I have been trying to provide for my money need in  
23 another way. The only way I know how to provide for health  
24 care needs in the future is through this program. And what  
25 we're really talking about is to try to get myself to the age

1 of 65 and so re -- we're talking about four years. So for  
2 these four years of coverage, I'm paying a lot because I've  
3 saved a lot of hours of sick leave. And then when I'm 65, the  
4 safety net there becomes Medicare. And the only thing I'd be  
5 buying after I reached that age is a supplemental Medicare  
6 insurance or whatever. And I know that that insurance can't  
7 cost the State nearly what it costs the State to be paying this  
8 benefit that they're paying on my behalf right now. So it's  
9 those four years that I'm looking at. But if I -- I bet if I  
10 took the hours and multiplied it by whatever my salary is at  
11 that time for those four years and whatever the supplemental  
12 is, I'm paying for it. And, in fact, the State probably will  
13 make some money on me.

14 Q Now, counsel asked you about this benefit being  
15 offered by statute and pointed out that you don't have a  
16 separate sort of agreement with the State that gives rise to  
17 this benefit. To your knowledge, Ms. Andersen, is this benefit  
18 that is provided by the unused sick leave retirement option  
19 program an optional program that the tax division elected to  
20 make available to its employees?

21 MR. WADDOUPS: Objection, foundation.

22 THE COURT: Sustained.

23 MR. HATHAWAY: I was inquiring, Your Honor, as to her  
24 knowledge, not whether that's what the law says.

25 THE COURT: Okay. Do you know?

1           THE WITNESS: Yes.

2           THE COURT: Lay some foundation. How does she know?

3           Q     (BY MR. HATHAWAY) How is it that you've come to  
4 learn that this is an optional program for the tax --

5           A     I -- as a tax manager, I have copies of HR rules and  
6 I read through the HR rules. I read through them because as a  
7 tax manager and as a manager of employees I need to know what  
8 the State's rules are with regard to sick leave, how you use  
9 it, how you use annual leave, how you -- there's grievance  
10 procedures in there, disciplinary procedures, and those kinds  
11 of things. Those are things that I need to know --

12           THE COURT: I don't think that addresses the  
13 question, though.

14           Q     (BY MR. HATHAWAY) In regard to the house -- the HR,  
15 the human resource rules that you've read that have been  
16 promulgated -- have they been promulgated under the  
17 compensation program of the State?

18           A     I believe they have and they are written and right in  
19 that rule they tell me that the agencies -- this is optional  
20 for agencies to opt in to use this -- to do this unused sick  
21 leave program.

22           MR. WADDOUPS: Objection, Your Honor, I think she's  
23 telling us what's in the rule. Move to strike.

24           THE COURT: Sustained. Therein lies the problem.

25           Q     (BY MR. HATHAWAY) In regard to House Bill 213, it's

1 your understanding as you've stated in response to counsel's  
2 question that there's a mandatory 25 percent deposit from the  
3 401(k). Would you tell us how the benefit of having the money  
4 put into a 401(k) differs from the benefit of having the  
5 eight-to-one conversion otherwise afforded you for this  
6 accumulated unused sick leave.

7       **A**     What I'm looking for is I'm looking for health care  
8 coverage. I'm not looking for a dollar amount to go into a  
9 401(k) contribution.

10       **Q**     At some point can you use the money in the 401(k) to  
11 buy --

12       **A**     Oh, clearly, yes, I can. And I'm not saying that  
13 that doesn't have any value.

14       **Q**     Is that money in the 401(k) as valuable as the hours  
15 held under the unused sick leave retirement option?

16       **A**     They're not. And they're not for any number of  
17 reasons, because what's happened is that you have health care  
18 costs that are -- just do the math.

19       **Q**     Now, counsel asked you about the ability to use the  
20 unused sick leave at the time of retirement to convert to buy  
21 this insurance of the eight-hour-to-one-month ratio. Now,  
22 that's one use of the sick leave that you accumulate.  
23 Presently you're able to use that sick leave?

24       **A**     Yes, I am.

25       **Q**     And you've described for us the uses that can be made

00230

1 of that?

2 A For sick leave?

3 Q Yes. Now, you have described for us those uses?

4 A But the way I use sick leave or can use sick leave is  
5 I can use it for any kind of sick leave occurrences that I  
6 personally have and I can also use sick leave for any kinds of  
7 medical, dental, sick occurrences that happen in the life of my  
8 son.

9 Q And that's a choice that you have under the present  
10 program?

11 A Yes, that is.

12 Q And by the same token you have the choice to take  
13 that sick leave that you've accrued immediately and hang on to  
14 it?

15 A Yes, I can.

16 Q Bank it for this --

17 A Yes, I can.

18 Q -- future benefit?

19 A And, obviously, I can use it as sick leave as well.

20 Q So that's a second choice that you have today based  
21 on the accumulated sick leave?

22 A Yes.

23 Q In your view, Ms. Andersen, what is it that you lose  
24 when House Bill 213 goes into effect? 00231

25 A I lose what I can do with the 320 hours of converted



1 sick leave, and that's important, and I obviously lose the  
2 ability to get the same usage of the saved sick leave hours in  
3 the future, because instead of rolling -- giving me paid-up  
4 health care, in fact, the hours that I'm going to be earning in  
5 program two I'm going to be compensated -- those hours are  
6 going to be compensated to me based on whatever my salary is  
7 and if that's greater than the average salary of somebody who  
8 retired in the previous year. And then they're going to take  
9 those dollars and they're going to roll those into a health  
10 savings account and that health savings account earns money,  
11 but I don't have any ownership in any of that. It's just money  
12 that's in a pot.

13 Q Now, in your --

14 A And I the only time I'm going to be able to use--  
15 let's say I have dollars roll into that pot. I am  
16 understanding that I've got to use all of whatever I earned in  
17 program one before I can touch any of those dollars that roll  
18 into that pot. And I might be -- and I've seen the  
19 calculation, 77 years of age, I might not be able to even use  
20 any of those dollars, but I -- you know, I may not use any of  
21 the program one health care coverage.

22 Q In your view based on your review of House Bill 213,  
23 would the requirement of your sacrificing, as you described it,  
24 and the requirement of your losing the choices as you described  
25 them be remedied if there was not a mandatory 25 percent

1 deposit into your 401(k) account upon retirement as provided by  
2 House Bill 213?

3 A I'm not sure I really understand your question.

4 Q If under House Bill 213 upon your retirement you were  
5 not required to convert 25 percent and deposit it into a 401(k)  
6 of your program one, whatever other hours might be -- would  
7 that address your concerns about these anticipated sacrifices  
8 and loss of choices that you've described?

9 A I believe it would.

10 MR. HATHAWAY: That's all the questions I have,  
11 Your Honor.

12 RECROSS EXAMINATION

13 BY MR. WADDOUPS:

14 Q Let me ask you about the area you've just testified  
15 to. If I understood you correctly, you said you understand  
16 that you must first use all of the health benefits accumulated  
17 under program two hours before you can access your program one  
18 hours?

19 A No, the reverse of it.

20 Q You must use your program one hours before you can  
21 access your program two hours?

22 A Yes.

23 Q And from whom did you obtain that understanding?

24 A Once again, there aren't any rules in place, and so  
25 you just hear it.

00233

1           Q     So is the fact -- you don't know whether the HR  
2 people take that position or not, do you?

3           A     I believe I do, because I believe I've been told  
4 that.

5           Q     Now, you understand that under House Bill 213 the  
6 number of accumulated hours you have at the time of your  
7 retirement still can convert, be converted to be used to  
8 purchase medical coverage at the rate of eight hours for one  
9 month coverage; correct?

10          A     Yes.

11          Q     And you understand that under House Bill 213 program  
12 two hours are converted at the rate of your rate of pay at  
13 retirement and are placed into a medical retirement fund?

14          A     Yes.

15          Q     And you can draw those medical retirement funds down  
16 for various reasons; correct?

17          A     Yes. I'm not certain as to the timing. I'm hearing  
18 that the timing of those will be after I totally use what I  
19 have in program one.

20          Q     But you're not hearing that from any official source;  
21 is that correct?

22          A     I'm not -- I hear so many things and I do so many  
23 things in the course of the day, I can't tell you exactly who  
24 told me that. I know it's -- because I'm not talking to  
25 people -- my peers about any of this, I know it can't be coming

1 from them.

2 Q So the fact of the matter is, you simply don't have a  
3 clear understanding as to how those rules will be applied once  
4 you retire?

5 A I don't, and I -- the only thing that I have and that  
6 I've been able to read is the statute itself, and I don't  
7 remember sitting here this morning, and maybe you can refresh  
8 my memory by putting a copy of the statute in front of me, if  
9 there's language in those statutes that are telling the HR,  
10 DHRM that they are to promulgate rules for this. Because if  
11 that's the case, then until those rules get promulgated, I  
12 don't know what those rules are.

13 Q Any understanding you have would be simply your  
14 reading of the statute?

15 A Yes.

16 Q Now, let me ask you about one other aspect you  
17 testified to. I think you said something like, You do the  
18 math.

19 And when you were talking about you doing the math,  
20 you were referring to the fact that under House Bill 213,  
21 program two hours which are accrued beginning next year are  
22 likely not to purchase as much medical insurance as you would  
23 be entitled to under the eight-to-one conversion under the  
24 present law; is that correct?

25 A Yes, that is true.

00235

1           Q     And is it correct, Ms. Andersen, that that's your  
2 real concern, that going forward, your accumulated hours do not  
3 have as much value as they do under the existing law?

4           A     I think my real concern is with those 320 hours of  
5 converted sick leave. That's my first concern. My second  
6 concern is with -- you know, you kind of have taken away my  
7 ability how I can use those hours because -- program one isn't  
8 identical to the -- there really are three programs out there.

9                     Currently I'm operating under the unused sick leave  
10 retirement benefit. And then the State has created this new  
11 program one that actually goes into effect January 1st of 2006,  
12 and at the same time they created -- at the same time that goes  
13 into effect, then comes in to place the program two.

14                    So in effect, you have this first program and the  
15 State's taking the first program and saying, we had to do  
16 something with this one so we need to roll it into program one  
17 and --

18           Q     I don't mean to interrupt you, but I think you're  
19 going beyond my question.

20                   MR. WADDOUPS: If I may, Your Honor.

21                   THE COURT: You may.

22           Q     (BY MR. WADDOUPS) The question was, is it true that  
23 your primary concern is you don't like the fact that going  
24 forward you don't get the eight-to-one conversion that you get  
25 under existing law?

1           **A**     Yes.

2           **Q**     Let me ask you with respect to with the 320 hours,  
3 because I don't want to leave the record ambiguous. Tell us  
4 what you understand the difference is under House Bill 213 and  
5 present law as to your ability to use the 320 converted sick  
6 leave hours.

7           **A**     My understanding of those 320 hours is that  
8 January 1st of 2006, rather than being able to use them as  
9 annual leave, if I left state employment to be cashed out or to  
10 save them to buy sick leave when I retire, I'm understanding  
11 that come January 1st that those -- all of those options go  
12 away.

13          **Q**     Do you understand that you lose the 320 hours  
14 completely?

15          **A**     I understand that instead of those being annual  
16 leave, instead of being able to be cashed out, I'm  
17 understanding them to not be available to me in any way until I  
18 retire.

19          **Q**     And do you have an understanding that under the  
20 present law the 320 accumulated sick leave hours are available  
21 to you at present?

22          **A**     Yes, they're currently available to me as annual  
23 leave.

24          **Q**     If you were able to leave the State's employment  
25 tomorrow, what would be your options with respect to the 320

1 hours as you understand it?

2       **A**     I would expect that if I were to leave the State  
3 tomorrow unvoluntarily that the State would pay me all of my  
4 annual leave, they would pay me all of my converted sick leave.

5       **Q**     So your understanding is that you'd get cashed out  
6 both for your annual leave and 320 hours of your sick leave or  
7 the converted sick leave, that's your understanding?

8       **A**     Yes, because they are annual leave --

9       **Q**     And what is your understanding based upon?

10       **A**     My understanding is based on if I were to leave -- I  
11 mean, I can use converted sick leave today if I want to.

12       **Q**     My question simply is, what is your source of that  
13 understanding? Is it from reading the regulations, did  
14 somebody tell you this, did you read the statute?

15       **A**     Through the years we've talked about it, the people  
16 that I've worked with have talked about that.

17       **Q**     And that's the source of your understanding?

18       **A**     Yes.

19       **Q**     One final area of questioning. You understand that  
20 under House Bill 213 the amount that's deducted for the 401(k)  
21 contribution is limited to the maximum amount you would be  
22 allowed to contribute in any one year to the 401(k) plan;  
23 correct?

24       **A**     Yes.

00238

25       **Q**     So whatever that 25 percent is is limited by the

1 amount of income that you have earned in the year you choose to  
2 retire?

3 A And I believe that the annual leave because it's  
4 really --

5 Q Is that a yes? You understand that the amount that  
6 is contributed to the 401(k) plan is limited to the amount of  
7 the income you've earned at least as a maximum in the year you  
8 choose to retire?

9 A Yes.

10 Q And if you were to make the decision to retire, for  
11 example, on January 2nd, the amount of that contribution would  
12 be practically nothing?

13 A No, it would be 320 hours times my -- it would be my  
14 annual leave times my current salary at that time.

15 Q On the second day of January the maximum amount that  
16 could be contributed to your 401(k) plan is the amount of your  
17 salary for two days; correct?

18 A And all of your -- because the State -- at the time I  
19 retire, my retirement check is a combination of all of that  
20 annual leave that I have there and any -- let's say I had some  
21 comp time and any of those kinds of hours that the State pays  
22 you for. That has got to roll in -- I would roll of that into  
23 a 401(k) and that can -- or if I didn't, the State -- when  
24 you're talking about that, if I roll in -- 00239

25 THE COURT: Are you understanding the question?



1           THE WITNESS: Yes, I am. What happens is, the  
2 State --

3           THE COURT: Well, why don't you answer the question.

4           Q     (BY MR. HATHAWAY) If you'd like, I'll repeat the  
5 question.

6           A     Yes.

7           Q     And I'll do it in two steps. Under that at the time  
8 you retire the 401(k) contribution cannot exceed what your  
9 compensation was in that year?

10          A     That is correct.

11          Q     And if you choose to retire on January 2nd the  
12 maximum amount of that deduction would be whatever compensation  
13 you've earned for those two days in that year; correct?

14          A     No.

15          Q     You have some understanding that the compensation  
16 from the prior year rolls forward?

17          A     No, I have the understanding that all of the leave  
18 balances that I have that the State pays you for, annual leave,  
19 rolls into that on the date of your retirement.

20          Q     So what ever that total leave balance was that's in  
21 your final compensation check would be the maximum amount you  
22 could contribute; correct?

23          A     Yes.

24          Q     And by making that choice you could significantly and  
25 perhaps completely eliminate any deduction from your existing

1 1600 hours; correct?

2 A No.

3 Q And would you explain why that's not the case.

4 A Because I don't want to give up that bank of that  
5 annual leave of those 320 hours which will have to be paid out  
6 on the date I retire.

7 Q So except for the annual leave, that would be the  
8 maximum amount that would come out of your 1600 hours?

9 A Yes, 320.

10 Q And you understand that it would come out of the 1600  
11 hours only if you didn't have sufficient program two hours to  
12 maximize the 401(k) contribution?

13 A Yes.

14 MR. WADDOUPS: Nothing further.

15 REDIRECT EXAMINATION

16 BY MR. HATHAWAY:

17 Q Counsel asked you what your real problem was with  
18 House Bill 213, and let me just understand. House Bill 213  
19 changes the way unused sick leave is accumulated -- may be used  
20 upon retirement that is accumulated after January 1st of this  
21 year; is that your understanding?

22 A Yes.

23 Q And it's different from the present program that  
24 allows you to accumulate it and use it for the  
25 eight-hour-to-one-month coverage?

00241

1           **A**     Yes.

2           **Q**     And you don't like the change, it's -- it's a change  
3 that's adverse to your interest as a State employee?

4           **A**     Yes.

5           **Q**     But you recognize the legislature can do that, don't  
6 you?

7           **A**     I'm not sure they can.

8           **Q**     You recognize the legislature can decrease your pay  
9 from one year to the next?

10          **A**     Yes.

11          **Q**     You don't like it?

12          **A**     No.

13          **Q**     But they can?

14          **A**     Yes.

15          **Q**     Now, under the present program, you've accumulated  
16 about 1600 hours?

17          **A**     Yes.

18          **Q**     Now, is your concern with House Bill 213 so much that  
19 their changing how the hours accumulate in the future may be  
20 affected or that they're decreasing the value of the 1600 hours  
21 you've already accumulated?

22          **A**     It's not what I can potentially earn in the future,  
23 it's what's happening with what is currently present.

24                   **MR. HATHAWAY:** Thank you. That's all I have.

25                   **MR. WADDOUPS:** Nothing further.

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1 THE COURT: Okay. You can step down. Thank you.

2 MR. HATHAWAY: Your Honor, we would call Debbie  
3 Price.

4 DEBBIE PRICE,

5 called as a witness by the Plaintiff, having been duly sworn,  
6 was examined and testified as follows:

7 THE WITNESS: I do.

8 DIRECT EXAMINATION

9 BY MR. HATHAWAY:

10 Q Ms. Price, would you please state your name.

11 A My name is Debbie Price.

12 Q And I understand that you are presently employed by  
13 the Department of Human Resource Management?

14 A Yes.

15 Q That's an agency of the State of Utah?

16 A Yes.

17 Q And you are presently the policy manager of  
18 compensation?

19 A Yes.

20 Q And that's a position that you've held since July of  
21 this year?

22 A Yes.

23 Q So approximately the last four months?

24 A Yes.

25 Q Now, as I understand it, you are in charge of the

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1 entire compensation benefits program for all State employees?

2       **A**     Yes, in the executive branch.

3       **Q**     And you set policy, you state rules, you oversee the  
4 compensation benefits and recommendations of the governor's  
5 office?

6       **A**     Yes.

7       **Q**     Now, you'd agree, wouldn't you, Ms. Price, that the  
8 State's employees are its most valuable resource?

9       **A**     Yes.

10       **Q**     And you'd agree with me also, speaking  
11 hypothetically, that if House Bill 213 took away something from  
12 the State's most valuable resources, its employees, that they'd  
13 already earned, that it would be in your office's interest to  
14 correct that wrong?

15       **A**     If that was the case, yes.

16       **Q**     But that would be good public policy?

17       **A**     Yes.

18       **Q**     Now, part of your responsibilities involves the  
19 comparison of public sector wages to private sector wages?

20       **A**     Yes.

21       **Q**     That's something you do on a regular basis?

22       **A**     Annually.

23       **Q**     And, in fact, you hire an outside consulting firm to  
24 conduct that comparison?

25       **A**     On some of our benchmarks, we do.

1           Q     And you establish those benchmarks that are most  
2 directly relevant to the State positions?

3           A     Yes.

4           Q     There are approximately 102 such benchmarks?

5           A     Yes.

6           Q     Do I understand correctly that by "benchmarks" you're  
7 really referring to types of jobs?

8           A     They can be characterized as categories of jobs.

9           Q     Could I have you take a look in that exhibit book in  
10 front of you. Exhibit No. 18. Do you have that in on front of  
11 you?

12          A     Yes.

13          Q     That's a document that was prepared by your office,  
14 was it not?

15          A     Correct.

16          Q     Over -- or under your supervision?

17          A     Yes.

18          Q     And this reflects a comparison based on the  
19 consultant's findings of Utah State employee wages and private  
20 sector?

21          A     The consultant's comparison for those benchmarks that  
22 we compare with on the consultants. Some of these we do on our  
23 own.

24          Q     Take a look at that exhibit. You've got the range  
25 mid point, then you've got the actual mean, and then you've got

1 a local or western, an LRAT-W (phonetic spelling)?

2 A Yes.

3 Q Now, the LRAT-W, does that refer to the sample that  
4 was relied on in determining a percentage?

5 A Yes.

6 Q So if we look at the top of the first page of this  
7 Exhibit No. 18 under Legal Enforcement Counsel II, that's a  
8 benchmark that is accepted by your department?

9 A Yes.

10 Q And according to that, persons that fit within that  
11 benchmark or that classification of employment are underpaid  
12 from the mid point 24.1 percent?

13 MR. WADDOUPS: Your Honor, I object. First of all,  
14 we're going into an area that falls within policy judgment of  
15 the State. It's not a question of whether the statute --  
16 whether the employees are disproportionately paid with respect  
17 to private employees, it's not an issue for this court, and I  
18 think that's where this is going. It is what it is, but I  
19 don't think the comparison of salaries is relevant to the  
20 issues here.

21 THE COURT: Mr. Hathaway?

22 MR. HATHAWAY: Your Honor, counsel has raised in its  
23 opening the purposes of this fact and he also mentioned one  
24 thing in particular in regard to there having been recent  
25 increases to address the comparison -- rather to address what

1 was being taken away by House Bill 213 as if a substantial  
2 replacement, and I just would like if I could follow this line  
3 of reason to show a basis for a recent --

4           **THE COURT:** Well, that hasn't occurred yet and it may  
5 never occur. I don't understand where you're coming from.

6           **MR. HATHAWAY:** Your Honor, I'm trying to address an  
7 argument that's been raised by counsel in their briefing and in  
8 their opening argument as to the purpose for pay adjustments,  
9 and if the Court will indulge me for a few minutes, I'm just --

10           **THE COURT:** I'm going to overrule the objection,  
11 Mr. Waddoups, but I think I'm inclined to agree that I don't  
12 think whether they're paid lower than someone else or higher  
13 than someone else doesn't really go to the heart of what this  
14 case is all about. You may think so, but I'm not sure I do. I  
15 know State employees aren't paid very well.

16           **MR. HATHAWAY:** Well, perhaps it is actually --

17           **THE COURT:** You can pursue it, I've overruled the  
18 objection, but -- go ahead.

19           **Q**     **(BY MR. HATHAWAY)** Based on your most recent  
20 comparisons you'd agree with me, wouldn't you, that State  
21 public employees on average are paid 16 percent below market.

22           **A**     Yes.

23           **Q**     Now, in fact over every year over the past three and  
24 a half years where you have filled a position in the policy or  
25 the compensation part of DHRM and then most recently being the



1 policy manager, the disparity between the two wages, that is  
2 State averages versus market average has increased?

3 A Until this year, yes.

4 Q Now, this year there was a pay adjustment; correct?

5 A Correct.

6 Q And that's referred to as a market comparability  
7 adjustment?

8 A Yes.

9 Q And it's an MCA adjustment?

10 A Yes.

11 Q And that was a package that was suggested by DHR and  
12 to be given to all State employees?

13 A Yes.

14 Q And it's my understanding that was effective as of  
15 July 2005?

16 A Yes.

17 Q The reason that DHRM recommended this MCA package  
18 adjustment was to address the issue of employees not advancing  
19 through their salary ranges despite their years of service?

20 A Yes.

21 Q There was no other reason for the MCA adjustment?

22 A MCAs are something we recommend to the governor's  
23 office annually in an attempt to keep ranges within market and  
24 move employees through their ranges.

25 Q And other than that, in particular with regard to the

1 recommendation that was approved and given this year, that was  
2 based on your concern with the issue of State employees not  
3 progressing within given their years of service?

4 A Yes.

5 Q Nothing else?

6 A Yes.

7 MR. WADDOUPS: Let me object to "nothing else."

8 THE COURT: I'm -- it's sustained. Because I know  
9 for a fact it was something else. And I don't know where she's  
10 coming from, but it was the lack of any kind of increase over  
11 three years. I lived through it, I know. I mean, that's a  
12 fact. They didn't get anything for I think three -- I'm just  
13 telling you, I know why that adjustment was made. I also know  
14 that the legislature appropriates money for salaries based on  
15 the kind of revenue that comes into the State. And if there's  
16 no revenue or if there are shortfalls, we suffer. Bottom line.

17 MR. HATHAWAY: Maybe I can finish it off with one  
18 last question, Your Honor.

19 THE COURT: You may.

20 Q (BY MR. HATHAWAY) The MCA program that was  
21 recommended and adopted this year had nothing to do with the  
22 passage of House Bill 213, did it?

23 A At the time we recommended it, no, it did not have  
24 anything to do with it.

25 Q As policy manager of compensation in DHRM and in

1 actually the responsibilities you had prior to July, you were  
2 asked to prepare a presentation to disseminate among all public  
3 employees of the State to address any concerns they may have  
4 about House Bill 213?

5       **A**     I was one of three people that put that presentation  
6 together, yes.

7       **Q**     And those three people were all within the department  
8 of human resource management?

9       **A**     Yes.

10       **Q**    If you'd take a look at Exhibit 16 in the same book,  
11 that's a copy of the Power Point presentation that was put  
12 together by DHRM for expressly that purpose; right?

13       **A**     Yes.

14       **Q**    If you look at the second slide on the first page of  
15 that document, it says, What is the purpose of the legislation,  
16 and it lists three items?

17       **A**     Yes.

18       **Q**    First is to control the spiralling cost of sick leave  
19 retirement benefit?

20       **A**     Yes.

21       **Q**    Second is to preserve the ability of employees to use  
22 sick leave for health care expenses in retirement?

23       **A**     Yes.

24       **Q**    And third was to comply with the IRS rules?

25       **A**     Yes.

00250

1           Q     Now, that was included in your Power Point and it was  
2 information that was available on the web to any public  
3 employee?

4           A     Yes.

5           Q     And then you took that and you went out and you held  
6 meetings within the various agencies for purposes of educating  
7 public employees with respect to the House Bill 213?

8           A     Yes.

9           Q     Now, in any of the presentations that you made, you  
10 never said anything in that presentation about the constructive  
11 receipt rules of the IRS, did you?

12          A     I said that to everyone in my presentations.

13          Q     Do you remember having your deposition taken in this  
14 case?

15          A     Uh-huh.

16               MR. HATHAWAY:  If I could approach, Your Honor, with  
17 a copy of her deposition?

18               THE COURT:  You may.

19          Q     (BY MR. HATHAWAY)  Maybe I could have you take a  
20 look, if you would, at page 69 starting on line 12.  And I'll  
21 read it, if you would -- do you have that in front of you?

22          A     Yes.

23          Q     And you remember you were under oath when your  
24 deposition was taken?

25          A     Yes.

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1           Q     And you were represented by counsel?

2           A     Yes.

3           Q     And the question put at line 12:

4                     "Now, you mention on the last line at the first box  
5 potential tax liability for constructive receipt. Now, you  
6 didn't include in your presentation anything about constructive  
7 receipt, did you?

8                     "Answer: No."

9                     Is that the question put and the answer you gave when  
10 you gave your deposition on October 26th of this year?

11          A     It is, but can I add to that?

12          Q     My question was just if that was the question you  
13 were asked and the answer you gave?

14          A     Yes.

15          Q     It's true, is it not, that you didn't even know that  
16 the State was in violation of the constructive receipt rules of  
17 the IRS when you were making these presentations?

18          A     We did not know for sure that we were in violation,  
19 but we knew that there was the potential that we were in  
20 violation.

21          Q     In fact, it wasn't until after all the presentations  
22 had been made and this lawsuit was filed, in fact, it wasn't  
23 until just a couple weeks before your deposition when you first  
24 learned of the constructive receipt issue; true?

25          A     No, we knew we were in potential violation, but

1 knowing whether we were certainly in violation we did not know  
2 until three weeks ago.

3 Q Would you leap over to page 70. Under -- let me have  
4 you read with me, if you would, line 23 at the bottom of page  
5 70.

6 "When was it that you first learned that the  
7 application of the existing program under certain circumstances  
8 may result in a violation of the IRS constructive receipt  
9 rules," and it goes over to the next page, "Answer: In  
10 conversation with counsel over the last few weeks."

11 Was that the question put and the answer you gave --

12 A Yes.

13 Q -- on October 26, 2005?

14 A Yes.

15 Q Now, as the specialist, actually the policy manager  
16 of compensation for the Department of Human Resource Management  
17 and previously as a specialist over compensation at DHRM and in  
18 fact in all the years that you've worked in human resources and  
19 the various agencies of the State have you ever become aware of  
20 a retiree being assessed taxes by the IRS for the violation of  
21 constructive receipt rules?

22 A No.

23 Q And it's true, is it not, that as we sit here today  
24 the State does not withhold any money from retirees to shield  
25 against any potential liability of the constructive receipt

1 rules?

2       **A**     We do not.

3       **Q**     And up through the present, that's not something that  
4 you've seen or heard of or had any experience with?

5       **A**     No.

6       **Q**     However, if House Bill 213 goes into effect -- or,  
7 excuse me, if House Bill 213 does not go into effect, to your  
8 knowledge the State fully intends to begin to withhold money?

9       **A**     I haven't had any discussions with any State  
10 officials on whether or not that will begin to happen or not.

11       **Q**     Take a look at page 79 of your deposition, would you?  
12 Beginning at line 18 -- actually line 12, and my question is:  
13 "You've added that, now we've had a chance to talk about it a  
14 little bit. In light of the fact that to your knowledge and  
15 your experience the IRS has never assessed the tax, you still  
16 consider that to be a real benefit under House Bill 213?

17               Line 18, "Answer: Yes, because it's my understanding  
18 that we know we're in violation and even if House Bill 213 does  
19 not become enacted we'll have to assess the tax."

20               Was that the question put and the answer you gave?

21       **A**     Yes.

22       **Q**     And, in fact, as the policy manager over compensation  
23 at DHRM that strikes you as being a little punitive, doesn't  
24 it?

25       **A**     I'm not sure that following an IRS regulation would

1 be considered punitive, but it may have seemed that way to the  
2 employees.

3 Q Take a look at page 79 again. Beginning at line 21 I  
4 asked:

5 "The State will begin to assess a tax?

6 "Answer: That's my understanding, yes.

7 "Question: Will they do it retroactively?

8 "Answer: I can't speculate on that.

9 "Question: Seems kind of punitive, doesn't it?"  
10 Over to the next page.

11 "Answer: It does."

12 Are those the questions put and your answer given on  
13 October 26th of this year?

14 A Yes.

15 Q Part of your responsibilities at DHRM include  
16 charting the costs of health insurance charged by the Public  
17 Employees Health Program, PEHP?

18 A No, I do not do that. PEHP does that.

19 Q They inform you on a regular basis what those costs  
20 are?

21 A They inform me, but I wouldn't say it's a regular  
22 basis, no.

23 Q And that's something that you're aware of?

24 A Yes.

25 Q In fact, you've communicated with them recently in



1 regard to what it costs the State on average to provide the one  
2 month of health coverage to its employees?

3       **A**     I've consulted with the division of finance on what  
4 that costs, but not PEHP.

5       **Q**     To your knowledge in your position at DHRM, that's  
6 \$760 a month presently?

7       **A**     That's approximately what a family plan costs.

8       **Q**     And according to PEHP, they anticipate over the next  
9 ten years that that will increase to \$2,400?

10      **A**     Yes, according to PEHP.

11      **Q**     Up here --

12              **MR. HATHAWAY:** If I could approach, Your Honor?

13              **THE COURT:** You may.

14      **Q**     **(BY MR. HATHAWAY)** Let me hand you Defendant's  
15 Exhibit 1, and that's a calculation related to possible  
16 scenarios of benefits earned to date by Roe One. Right?

17      **A**     Correct.

18      **Q**     That's Mr. Yockey?

19      **A**     Yes.

20      **Q**     You prepared that sheet, didn't you?

21      **A**     I did.

22      **Q**     You also ran all of the numbers and did the  
23 calculation following down the effect, essentially, or possible  
24 scenarios that affect the benefits of Mr. Yockey?

25              **MR. WADDOUPS:** Your Honor, we have haven't offered

1 Defendant's No. 1. If we're going to use it for  
2 cross-examination it probably should be offered, and we offer  
3 it.

4 THE COURT: Do you have any objection, Mr. Hathaway,  
5 since you want to use it?

6 MR. HATHAWAY: I have no objection.

7 THE COURT: Defendant's Exhibit 1 is received.

8 (Defendants' Exhibit No. 1  
9 was received into evidence.)

10 Q (BY MR. HATHAWAY) The assumptions on footnotes 1, 2  
11 and 4 are not yours; correct?

12 A Correct?

13 Q You didn't have anything to do with providing that  
14 information?

15 A No.

16 Q The formula that was used to compute the number  
17 that's plugged in there as the tax liability is not yours  
18 either; correct?

19 A Correct.

20 Q That was provided to you by someone else?

21 A Yes.

22 Q You don't know how that number was calculated?

23 A I understand the basic premise of how it's  
24 calculated, but how specifically they came up with it, no.

25 Q Now, you'd agree, wouldn't you, in looking at that

1 Exhibit 1, that if Mr. Yockey retires on the date that he  
2 states he was planning on retiring, he would be worse off under  
3 House Bill 213 than under the current program?

4       **A**     That entirely depends on what his goal is.

5       **Q**     If his goal is to maximize his insurance benefit, to  
6 preserve as much as he can of his ability to purchase insurance  
7 as it's allowed under the present program at the eight-to-one  
8 ratio, he would be better -- excuse me, he would be worse off  
9 under House Bill 213 retiring in April as indicated than under  
10 the present program?

11       **A**     Correct.

12       **Q**     And you don't have any criticism really with the  
13 method used in computing --

14               **MR. HATHAWAY:** Could I approach, Your Honor? I don't  
15 have a copy of the exhibit with me.

16               **THE COURT:** Sure.

17       **Q**     **(BY MR. HATHAWAY)** If we follow down the lines in the  
18 various columns from the accumulated sick leave balance down to  
19 mandatory 401(k) contribution, all the way down to total months  
20 of insurance, the method employed in determining the total  
21 months of insurance, that's your mathematics?

22       **A**     Yes.

23       **Q**     And you don't have any concerns with whether or not  
24 the mathematics and the formula that you used to get to that  
25 number complies with the requirements of 213?

1           A     I don't have any concern about that.

2           Q     In your view, as policy manager over compensation at  
3 the Department of Resource Management, House Bill 213's  
4 requirement that 25 percent of the -- of whatever the benefits  
5 are -- that is whatever the unused sick leave, whether it's  
6 program one or program two are of a retiree into a 401(k)  
7 account is a benefit to the State?

8           A     It is.

9           Q     It saves the State having to buy insurance at the  
10 eight-hour-to-one-month ratio at whatever that cost may be  
11 projected in the future?

12          A     Yes. Assuming that's a higher cost, yes.

13          Q     That was one of the purposes of House Bill 213, to  
14 stop this spiraling cost and the State's liability to pay it?

15          A     Yes.

16          Q     Now, for a State employee who wants to buy continuing  
17 coverage, he or she may use the 401(k) to purchase that at the  
18 market rate?

19          A     They could use that for whatever purposes they  
20 choose.

21          Q     If their objective was to maximize their insurance  
22 coverage, they could use that under the old program as well as  
23 under the new for that purpose?

24          A     Yes.

00259

25          Q     However, that would be at the market rate, not the

1 advantage eight-hour-to-one-month rate?

2       A     Correct.

3       Q     And by the same token, House Bill 213 and its  
4 mandatory requirement of the 25 percent contribution is a net  
5 detriment to employees whose goal is to continue their  
6 insurance coverage?

7       A     Not in all cases, no.

8       Q     Could I have you take a look at your deposition  
9 again? Let's take a look at page 113. Begin at line 14. Do  
10 you have that?

11      A     Yes.

12      Q     "And by the same token it would be a net detriment to  
13 the employee by receiving the cash into the account that  
14 otherwise may, if they wanted to maximize their health  
15 insurance coverage, elect to put in and to buy health insurance  
16 at eight hours to one month?

17            "Answer: Yes, for the employees whose insurance is  
18 their goal."

19            Did I read the question and your answer correctly?

20      A     Yes.

21      Q     And that was the answer you gave in response to my  
22 question at the time of your deposition?

23      A     Yes.

24      Q     Under the current program, an employee upon           00260  
25 retirement can receive cash in exchange for their annual leave?

1           A     Yes.

2           Q     And they can choose to do that upon retirement  
3 without there being any economic consequence to their  
4 accumulated sick leave?

5           A     Yes.

6           Q     And it doesn't affect in any way their ability to use  
7 all their accumulated sick leave to purchase insurance at the  
8 desired eight-hour-to-one-month ratio?

9           A     Under the new program it could have an effect  
10 depending what they did with the cash. If they put it into a  
11 401(k), it would have an effect; if they took the cash, it  
12 would have a different effect.

13          Q     Maybe I didn't make myself clear. Under the current  
14 program before House Bill 213 goes into effect, an employee can  
15 retire and cash out all 320 hours, whatever they may have  
16 accumulated, and it has no consequence on their ability to use  
17 their accumulated sick leave?

18          A     Correct.

19          Q     And they can use it to buy the insurance at the  
20 eight-to-one ratio?

21          A     Yes.

22          Q     By the same token, they can use it to take cash out  
23 and put it in their 401(k)?

24          A     Yes.

25          Q     The 25 percent?

00261

1           A     Yes.

2           Q     That's their choice?

3           A     Yes.

4           Q     Now, under House Bill 213 as you pointed out, if an  
5 employee elects to cash out their annual leave at retirement  
6 it's going to have an adverse economic consequence on the use  
7 of their accumulated sick leave and their ability to exchange  
8 it for the advantaged eight-to-one ratio?

9           A     Can you repeat that, please.

10          Q     Let me be a little more specific. If an employee  
11 retires and they want to take cash, they want to convert their  
12 annual leave to cash, that will be deemed income for them in  
13 that year; right?

14          A     Correct.

15          Q     And, consequently, it will have an effect on where  
16 the 25 percent that's required to be paid under House Bill 213  
17 comes from; correct?

18          A     Correct.

19          Q     Now, they could take that, rather than take it as  
20 cash they could put it in their 401(k); correct?

21          A     Correct.

22          Q     And I think it's your view that to maximize their  
23 benefit that's what they ought to do?

24          A     Correct. 00262

25          Q     Because they'd start eating up the 25 percent.

1           A     Correct.

2           Q     Whereas if they take cash they don't get that  
3 benefit?

4           A     Correct.

5           Q     So all of their other leave is at risk under the  
6 mandatory requirement of 25 percent?

7           A     That depends on the employee and their goal.

8           Q     If they take it out as cash, they risk the remaining  
9 leave that they've accumulated over the course of their  
10 employment.

11          A     I think if you want as much as you can get into a  
12 401(k) then that's not a risk for you.

13          Q     Sure it's not a risk for you because you want all the  
14 cash or you want it all in your 401(k)?

15          A     Correct.

16          Q     Nevertheless, whether they take it as cash or whether  
17 they take it in their 401(k), it cuts down the amount they're  
18 able to use for that eight-to-one conversion?

19          A     It could, yes.

20          Q     It does, doesn't it?

21          A     Yes.

22          Q     Now, under the current retirement program, preHouse  
23 Bill 213, a State employee can retire at any month of the year  
24 without there being any economic consequence?

25          A     As long as they qualify to retire, yes.

00263



1           Q     Assuming they otherwise meet the requirements to  
2 retire, they can retire at any month of the year without there  
3 being any economic consequence?

4           A     Yes.

5           Q     And particularly any adverse economic consequence?

6           A     Yes.

7           Q     And it doesn't impinge in any way on their use of the  
8 accumulated unused sick leave?

9           A     No.

10          Q     Now, under House Bill 213 the month that an employee  
11 elects to retire makes a difference economically for them?

12          A     Yes.

13          Q     If, for example, an employee wasn't concerned with  
14 health insurance, it may make less of a difference because  
15 they'll either receive cash out or they'll receive an increase  
16 to their 401(k) and they'll have the benefit of that cash?

17          A     Correct.

18          Q     But even for that employee, he's going to have  
19 less -- or she -- available in the remaining unused sick leave  
20 to buy health insurance?

21          A     Correct.

22          Q     And if, on the other hand, we're dealing with an  
23 employee whose objective is to maximize their medical care  
24 option, it becomes more critical which month of the year they  
25 elect to retire?

1           A     It does, yes.

2           Q     And you consider this to be a loophole, don't you?

3           A     That's what we were referring to it, yes.

4           Q     And just like any loopholes, in your experience, the  
5 legislature can close them?

6           A     Yes.

7           Q     Now, presently I understand that there have been  
8 rules promulgated, although they have not been adopted since  
9 House Bill 213 is not into effect.

10          A     Correct.

11          Q     Part of your responsibilities at the DHRM is to apply  
12 the provisions of House Bill 213 to the State's various  
13 employees?

14          A     Yes.

15          Q     Correct?

16          A     Yes.

17          Q     In fact, in this case in particular, in response to  
18 what we refer to as a 30(b)(6) deposition, you were identified  
19 as the individual on behalf of the State of Utah charged with  
20 the responsibility of applying House Bill 213 to the State's  
21 employees?

22          A     Yes.

23          Q     It's true, is it not, that House Bill 213, in its  
24 plain language, if you read the statute, says nothing about the  
25 priority of the payment of the 25 percent?

00265

1           A     Correct, it does not.

2           Q     In fact, it says, if you read it, and you're talking  
3 about program one hours, 25 percent shall be deposited in to a  
4 401(k)?

5           A     Up to IRS --

6           Q     Subject to IRS rules?

7           A     Yes.

8           Q     And it says 25 percent of the converted sick leave  
9 subject to the IRS rules will be deposited into 401(k)?

10          A     Yes.

11          Q     Shall be deposited?

12          A     It does say that.

13          Q     And it says that 25 percent of the program two hours  
14 subject to the IRS requirements shall be deposited in to a  
15 401(k)?

16          A     Subject to IRS limits, yes.

17          Q     It says nothing about the priority of how either one  
18 of those or any other benefit, for that matter, will be applied  
19 to satisfy that 25 percent?

20          A     It does not.

21          Q     Now, the rules that have been agreed upon but not  
22 placed into effect similarly have the same requirements of that  
23 25 percent?

24          A     Correct. 00266

25          Q     Correct? And they say nothing about the priority;

1 correct?

2 A I don't have the memorization of the new rule.

3 Q I have them here if you want to take a look just a  
4 minute to refresh your recollection. It's under tab 19. Take  
5 whatever time you need to review that.

6 A Okay.

7 Q The rules that have been promulgated though not  
8 placed into effect under House Bill 213 do not provide priority  
9 for the use of the 25 percent?

10 A They do not.

11 Q And, in fact, if there is any policy, it exists just  
12 as a practical matter by reason of the decree of Governor  
13 Huntsman?

14 A Correct.

15 Q And DHRM, based on that decree, has taken the  
16 position that its policy will be to provide a priority to the  
17 payment of the 25 percent?

18 A Yes.

19 Q Now, in your experience working for the government  
20 over the past several years, decrees change, don't they?

21 A Yes.

22 Q And the legislature can also change a decree, can  
23 they not?

24 A Correct. 00267

25 Q And elected officials sometimes don't get reelected

1 when their decrees change?

2       **A**     Correct.

3       **Q**     Let me have you take a look back again at Exhibit 16,  
4 which I believe is the slide presentation. Referring you  
5 particularly to the second slide from the top. Do you have  
6 that in front of you?

7       **A**     I do.

8       **Q**     Now, it's true, is it not, Ms. Price, that every one  
9 of those objectives could be accomplished under House Bill 213  
10 and it's all of the provisions of House Bill 213 without the  
11 mandatory 25 percent cashout and payment into a 401(k)?

12               **MR. WADDOUPS:** Objection, I think he's asking her to  
13 speculate about what the legislature may have intended and may  
14 have wanted to accomplish.

15               **THE COURT:** Sustained. I don't think she would know  
16 that.

17               **MR. HATHAWAY:** Well, with all due respect,  
18 Your Honor, I'm asking her what her understanding is as the  
19 policy director of compensation for the DHRM and charged with  
20 the --

21               **THE COURT:** Well, the policy is written by the  
22 legislature in the statute. That's the policy. Now, they may  
23 interpret it, but you're asking her to go beyond what House  
24 Bill 213 provides, you're trying to get her to figure out  
25 whether -- or respond to the inquiry as to whether all of these

1 goals or purposes of House Bill 213 could be done without House  
2 Bill 213, if I heard the question right.

3 Q (BY MR. HATHAWAY) No, then I didn't make myself  
4 clear.

5 In regard to your interpretation and the presentation  
6 that you made, is it your understanding that the objectives of  
7 the slide, your slide could be obtained through House Bill 213  
8 without the mandatory 25 percent payment into 401(k)?

9 A I really can't speculate on that because I wasn't  
10 part of putting all the numbers together and figuring out how  
11 to save costs as part of the bill.

12 Q And that isn't one of the scenarios that you ran  
13 internally in coming up with not only with the slide  
14 presentation and not just with the charts that you prepared for  
15 purposes of this litigation, but in evaluating and interpreting  
16 and applying House Bill 213?

17 A We just developed scenarios and presentations based  
18 on what the statute was.

19 Q And no one of those scenarios had anything to do with  
20 how the bill and its purposes might change with the removal of  
21 the 25 percent?

22 A Other than when you retire during the year it makes  
23 your IRS maximum lower and does affect the way the formula  
24 works, yes. But other than that, no. 00269

25 Q Without that mandatory 25 percent, it wouldn't make

1 any difference when in the year you retired, would it?

2       **A**     Well, it may, because some people want the IRS --  
3 want to get as much in their 401(k), so --

4       **Q**     If the employee chose to put as much as they could in  
5 a 401(k), they certainly could?

6       **A**     Yes.

7       **Q**     However, without the mandatory taking of 25 percent  
8 and depositing it into a 401(k), it wouldn't make any economic  
9 difference to any public employee when in the year they  
10 retired, would it?

11       **A**     Not that I can think of, no.

12       **Q**     And in fact for you personally, in your position,  
13 given your experience, you consider it very important to be  
14 able to choose when it is that you retire, don't you?

15       **A**     Correct.

16               **MR. HATHAWAY:** I don't have any further questions.

17               **THE COURT:** Do you want to take ten minutes? Be in  
18 recess? I worry about Teena.

19               (A recess was taken.)

20               **THE COURT:** Okay. Ready to go, Mr. Waddoups?

21                               **CROSS EXAMINATION**

22       **BY MR. WADDOUPS:**

23       **Q**     Ms. Price, if we could, I'd like to take you back to  
24 the beginning a little bit and have you, first of all, again  
25 tell us, what is your position with the State of Utah?

1           A     I'm the policy manager of compensation benefits.

2           Q     And how long have you held that position?

3           A     Since July of this year.

4           Q     How long have you been employed by the State of Utah?

5           A     For 13 years.

6           Q     How many years have you been employed in the human  
7 resources department?

8           A     At the Department of Human Resource Management I've  
9 been there about three and a half years.

10          Q     And within the human resource department would you  
11 tell us generally what that area or that agency does.

12          A     The Department of Human Resource Management is the --  
13 you could characterize it as the central human resource office  
14 that handles policies and rules and basic human resource system  
15 functions for all the agencies of their HR staff.

16          Q     During the period that you've been employed in human  
17 resources, what other areas of responsibility have you held?

18          A     I have worked all the way from the beginning as being  
19 a human resource technician doing payroll, new hire paperwork,  
20 going through benefits with employees, all the way through  
21 being promoted to analyst level positions where I got more  
22 involved in recruitment classification, reports, special  
23 projects, desk audits, investigations, discipline, and then  
24 went to the department of human resource department as a  
25 compensation specialist and focused on compensation of



1 benefits, doing the salary survey, policy, working with PEHP  
2 and Utah Retirement Systems on our benefit program for  
3 employees' training.

4 Q When did you first start as a clerk in human  
5 resources?

6 A I first started in human resources at the Department  
7 of Health in -- I believe it was 1993 or '94.

8 Q Since that time, has your work been entirely in  
9 connection with human resources in one agency or another?

10 A Yes.

11 Q When House Bill 213 was going through the legislative  
12 process, what position did you hold at that point?

13 A At that time I was the compensation and benefits  
14 specialist.

15 Q Did you have any involvement in dealing with the  
16 legislature in the passage of House Bill 213?

17 A No, I did not.

18 Q Now, before I move on, also would you summarize for  
19 us what your education is?

20 A I have a bachelor's degree in business management  
21 from the University of Phoenix and I also have a master's  
22 degree in organizational management from the University of  
23 Phoenix.

24 Q When did you obtain those degrees?

00272

25 A My Master's degree this year in 2005 and my

1 bachelor's degree was in 2003.

2 Q Did you go to school while you were working full  
3 time?

4 A I did, yes.

5 Q In terms of the hierarchy in terms of your position,  
6 to whom do you report?

7 A I report to James West.

8 Q And what is his position?

9 A He's the policy director.

10 Q And to whom does he report?

11 A He reports to our deputy director, Jean Wills Barber.

12 Q Whom does she report?

13 A She reports to our executive director, Jeff Herring.

14 Q Okay. So in terms of responsibility within the  
15 department, where do you rank in terms of your job?

16 A I'm not sure I understand what you mean.

17 Q Well, I didn't ask the question very well. In terms  
18 of your relationship to policy matters, there are three people  
19 between you and the director; correct?

20 A Correct.

21 Q And then the director reports to whom?

22 A To the governor.

23 Q So what role do you have in term of participating in  
24 developing policy for human resource matters? 00273

25 A As far as anything compensation related and benefit

1 related, that would fall under my responsibility.

2 Q And you've had -- how long have you had that  
3 responsibility?

4 A Since July of this year.

5 Q And prior to July of this year, did you have any  
6 responsibility for development of policies?

7 A I did participate but it wasn't my -- I was not the  
8 final responsibility for that. My boss at that time would be  
9 in my position, current position, would have been.

10 Q Now, after House Bill 213 was passed by the  
11 legislature how did you become involved with that bill?

12 A We became involved -- well, we knew we would become  
13 involved if it was passed because it fell under DHRM's  
14 responsibilities of administering the program and Jeff, our  
15 executive director, was given direction from the governor to  
16 get out to the employees to educate them on the bill. So we  
17 immediately began putting together information for the  
18 employees.

19 Q Did you make presentations to employees?

20 A Yes.

21 Q Would you tell us to whom those presentations were  
22 made.

23 A There were three of us from the Department of Human  
24 Resource Management that traveled all over the State. It was  
25 approximately three, three and a half months that we went out

1 and did that in various locations. I couldn't tell you the  
2 number of employees that attended each of our sessions, but  
3 most of them were very well attended.

4 Q Did someone give you direction to hold these  
5 meetings?

6 A Yes, the governor's office did.

7 Q What did they tell you to do?

8 A They realized there was a lot of bad --  
9 misinformation about what House Bill 13 meant and employees  
10 were afraid of the bill, so we were told to put something  
11 together, some educational materials, and travel the state and  
12 educate them.

13 Q Do you know how many different meetings you made  
14 presentations at?

15 A I'm guessing that I probably made between 20 and 25  
16 presentations myself.

17 Q Were there any major groups of employees that you  
18 know of that did not receive a presentation?

19 A Not that I know. We've had a lot of people calling  
20 us that have said they haven't gone to a presentation, but they  
21 were open to any employee to come to, whether they were a court  
22 employee or an executive branch employee and just anybody that  
23 wanted to come, any department at any time could come. And we  
24 also talked to people on the phone, so they didn't necessarily  
25 need to go to a presentation to get the same information.

1           Q     I was going to ask you, when someone calls up is it  
2 part of your responsibility to answer questions?

3           A     Yes.

4           Q     Do you receive calls on a regular basis?

5           A     Every day.

6           Q     Now, in terms of deciding what was going to be said  
7 at these meetings, how did you go about establishing what the  
8 application of House Bill 213 would be?

9           A     Those of us who it just kind of fell under were  
10 myself and my boss at that time, Maureen Wise and Con Whipple,  
11 and of course conversations with Jeff Herring all had meetings  
12 to interpret the bill and figure out what to put in the  
13 presentation and what would be important for employees to know.

14          Q     I believe you may still have open in front of you  
15 Exhibit 16?

16          A     Yes.

17          Q     Would you tell the court what Exhibit 16 is.

18          A     This is the presentation that DHRM put together that  
19 we gave to the employees.

20          Q     Was that the actual -- were these the actual slides  
21 that were used in the employee presentations?

22          A     Yes, it looks like --

23          Q     Did you make any effort to determine whether or not  
24 this presentation accurately presented the requirement of House  
25 Bill 213?

1       **A**     Well, in just internal discussion at DHRM and all of  
2     us looking at the bill and coming up with different aspects and  
3     walking through that bill line by line and making sure that our  
4     scenarios and our information was covered.

5       **Q**     Did you do anything to verify that you were not  
6     misstating any of the aspects of the bill with supervisors or  
7     other people?

8       **A**     Other than internal staff at DHRM all going through  
9     this the only thing I did on my own additionally was look up  
10    IRS regulations just to verify IRS maximization on 401(k)  
11    limits.

12      **Q**     Did you review the statute personally?

13      **A**     Yes.

14      **Q**     As a group did you go through the statute and make  
15    sure you had interpreted it and applied it correctly?

16      **A**     As a group we did not, we were mostly relying on  
17    information from Craig Stone from the Utah Retirement Systems  
18    who is the 401(k) division director over there if that  
19    information was correct.

20      **Q**     To the best of your knowledge, did you present any  
21    information in these meetings that you now understand to be  
22    incorrect?

23      **A**     Initially -- the only thing we changed in the  
24    presentation was initially one of our scenarios were  
25    calculating adding the sick leave to the converted sick leave

1 and then applying the deduction, but the deduction can never  
2 come out of converted sick leave, so we did make that  
3 adjustment. That was the only adjustment we made.

4 Q I'm going to walk you through House Bill 213 in a  
5 moment and ask you to explain how the agency interprets it.  
6 Let me ask you first of all to look at the second slide which  
7 Mr. Hathaway asked you about.

8 You've got the third bullet point which reads, Comply  
9 with IRS rules, giving employees a choice makes all choices  
10 taxable.

11 When you gave the presentation, what did you say  
12 about that bullet point?

13 A What I told employees is that this wasn't a key  
14 driver of House Bill 213 but while they were in looking at the  
15 retirement program that it was an opportunity to change this  
16 and that we would make sure we weren't putting our employees in  
17 the potential tax liability with the IRS.

18 Q Is this the IRS regulation that you personally  
19 reviewed to see if you were applying it correctly?

20 A No, the one I reviewed was on the 401(k) limits.

21 Q Have you heard the term "constructive receipt of  
22 income"?

23 A Yes.

24 Q Does this bullet point have to do with the  
25 constructive receipt of income?

1           A     It does.

2           MR. HATHAWAY: Your Honor, I object. I think she  
3 said that she didn't review the IRS regulation and we're  
4 basically getting in the position of having to have her  
5 interpret the IRS's law.

6           MR. WADDOUPS: I'm not asking you to interpret the  
7 law except to tell us how the agency applies it.

8           THE COURT: Overruled.

9           Q     (BY MR. WADDOUPS) Now, did you advise employees that  
10 there was an issue about the constructive receipt of income?

11          A     Yes.

12          Q     What did you tell them?

13          A     I told them when we got to this slide that the  
14 current program has a choice of what you can do with the 25  
15 percent and that there is something called the constructive  
16 receipt with the IRS that could make all those choices taxable.

17          Q     Now, a moment ago when Mr. Hathaway was examining you  
18 he read you a question from your deposition about this  
19 particular bullet point and you answered his question then  
20 asked to explain. Do you recall that?

21          A     Yes.

22          Q     What explanation did you want to give?

23          A     Well, the question and the answer that he asked me,  
24 there were further questions in my deposition that clarified  
25 that, yes, in fact we did cover constructive receipt in every



1 presentation, at least I did in every one of mine.

2 Q And let me just be more direct. Is this issue of  
3 constructive receipt something what was made up after this  
4 litigation was filed?

5 A I'm sorry, ask that one more time.

6 Q Was this issue of the constructive receipts an issue  
7 that was not considered until after the litigation was filed?

8 A No, we knew it was potentially a problem, that's why  
9 it was put in the bill to correct a potential problem. But  
10 whether we absolutely knew there was a problem, no.

11 Q And by "knew" meaning whether or not the IRS would in  
12 fact apply its regulations?

13 A Correct.

14 Q Now --

15 MR. HATHAWAY: Your Honor, I'm going to object and  
16 ask that it be stricken. She doesn't know whether the IRS is  
17 going to -- I don't think she's in a position to testify.

18 THE COURT: Wasn't that what she said, she didn't  
19 know whether they would or they wouldn't?

20 MR. HATHAWAY: Perhaps I misunderstood. I understood  
21 that --

22 THE COURT: Did I understand, Mr. Waddoups?

23 MR. WADDOUPS: Let me see if I can clarify.

24 Q (BY MR. WADDOUPS) It was the agency's -- was it the  
25 agency's position that this was an issue without knowing

1 whether or not in fact the IRS would apply the constructive  
2 receipts rule?

3 A Yes.

4 Q Now, on the slide presentation, the first bullet  
5 point Mr. Hathaway asked you about was, To control spiraling  
6 cost of sick leave retirement benefits. Do you have an  
7 understanding of how House Bill 213 accomplishes that  
8 objective?

9 A I do.

10 Q And how -- how did you obtain that understanding?

11 A From discussion with internal staff at Department of  
12 Human Resource Management and just knowing why the bill was  
13 introduced, discussion with the division of finance on the  
14 costs of the program.

15 Q Would you explain to the court how that objective is  
16 achieved by House Bill 213.

17 A My understanding of what --

18 MR. HATHAWAY: Object, calls for hearsay.

19 THE COURT: Her understanding?

20 MR. HATHAWAY: What it's based on.

21 THE COURT: I don't think so. Overruled.

22 THE WITNESS: My understanding of what House Bill 213  
23 was trying to accomplish was not that -- the State is not going  
24 to save a lot of money immediately but the point was to change  
25 the way the program works in the future so that eventually when

1 we get 10, 15, 20 years down the road employees that are  
2 retiring will have more hours in program two than they will  
3 have in program one, and that's where the State's going to see  
4 the cost savings because they'll be giving them dollars that  
5 the employees can use to purchase insurance at the market rate  
6 at that time instead of eight hours buying an insurance plan  
7 that has an escalating cost every year. So the savings would  
8 not be immediate because most immediate retirees are going to  
9 have program one time. It was program two where the costs were  
10 going to be saved.

11 Q (BY MR. WADDOUPS) And part of House Bill 213 affects  
12 the 25 percent deduction that goes into a 401(k) plan.  
13 According to your understanding, what portion of that  
14 contributes to savings under House Bill 213?

15 A The 25 percent saves because it was chosen to go  
16 as -- in a prior contribution into the 401(k), it saves the  
17 State in the FICA taxes that they do not have to pay on those  
18 funds.

19 Q There are certain cases where that 25 percent may not  
20 come out of program one hours; is that correct?

21 A Yes.

22 Q And in those cases, those savings are not realized?

23 A I'm sorry, ask that one more time.

24 Q Well, the savings from not having to pay FICA only  
25 occurs if in fact there is a contribution to the 401(k) plan;

1 correct?

2       A     Correct.

3       Q     Now, let me back up for a moment and ask you to  
4 explain some of the basic fundamental benefits that employees  
5 are entitled to. Let's start first with annual leave. What is  
6 annual leave?

7       A     Annual leave is vacation time, most people know it as  
8 vacation time. You can use it for whatever reason you want as  
9 long as you have supervisor approval to be gone.

10      Q     At what rate do employees accrue annual leave?

11      A     That's based on your years of service. Your first  
12 five years of employment you earn four hours per pay period,  
13 five to ten years you earn five hours per pay period and ten to  
14 20 you earn six hours per pay period, and after 20 years of  
15 service you earn seven per pay period.

16      Q     Can annual leave be carried forward from year to  
17 year?

18      A     Only 320 hours.

19      Q     With respect to the 320 hours that is carried forward  
20 from previous years, how may an employee use that?

21      A     They can use that while employed for whatever reason,  
22 granted supervisor approval. If they terminate or retire, that  
23 balance is cashed out.

24      Q     So if during a year an employee wants to use  
25 carried-over annual leave, he can actually take time away from

1 work?

2       **A**     Correct.

3       **Q**     During that period of time does he receive full  
4 salary?

5       **A**     Correct.

6       **Q**     And his benefits continue in full amount; correct?

7       **A**     Correct.

8       **Q**     Then the amount they chose is then deducted from the  
9 320 hours in the year they're used?

10       **A**     Correct.

11       **Q**     If the employee elects to leave employment or is  
12 involuntarily terminated what can he do with the 320 hours?

13       **A**     They're cashed out and then the employee can either  
14 choose the cash or can have the money rolled over into their  
15 401(k) from their last paycheck or 457 account.

16       **Q**     If an employee is eligible to retire and retires,  
17 what option are eligible for the 320 hours?

18       **A**     The same option. They cash them out and choose to  
19 take the cash or roll them into a 401(k) or 457.

20       **Q**     Does House Bill 213 in any way change or affect those  
21 rights?

22       **A**     They do not.

23       **Q**     The employee has the same rights with respect to the  
24 320 hours whether House Bill 213 is in effect or not in effect;  
25 correct?

1           A     Yes.

2           Q     Now, let me ask you with respect -- under the  
3 existing law, annual sick leave, how much annual sick leave  
4 does an employee accrue?

5           A     All employees, regardless of years of service accrue  
6 four hours per pay period.

7           Q     And those -- if the -- for what purposes can an  
8 employee use sick leave?

9           A     Sick leave is a contingent benefit, meaning you need  
10 to be sick. There is rules -- DHR rules that establish what  
11 law -- it's for your own illness, your spouse or dependents  
12 illness, medical appointments, those kinds of things that are  
13 related to being sick.

14          Q     If sick leave is not used in a particular pay period,  
15 what happens to it?

16          A     Sick leave accumulates ongoing, there's no cap on  
17 sick leave.

18          Q     And under the existing law, what are the uses to  
19 which an employee can while employed use the accumulated sick  
20 leave?

21          A     Just for those reasons that would fall under our  
22 rules, being sick, you, your spouse, your dependents, or  
23 medical appointments.

24          Q     Okay. So if an employee has, as an example we heard  
25 today of 1600 hours sick leave accumulated, is that available

1 for the purposes set forth in the regulations?

2 A It is, yes.

3 Q So an employee who had 1600 hours could take  
4 approximately 200 days away from work if they qualified?

5 A Yes.

6 Q And that qualification would be taking care of a  
7 dependent or spouse; correct?

8 A Or themselves.

9 Q Or themselves. Now, if an employee terminates or  
10 leaves employment before retirement, what happens to the  
11 accumulated unused sick leave?

12 A Those hours are all forfeit.

13 Q Okay. So if the employee decides for whatever reason  
14 to leave the State employment, whatever value he has in those  
15 1600 or whatever accumulated hours is lost; correct?

16 A Correct.

17 Q And that occurs whether the termination is voluntary  
18 or involuntary?

19 A Correct.

20 Q Does the -- what happens if the employee dies?

21 A Then the hours are forfeit.

22 Q Is there an exception for public safety?

23 A If you die within the line of duty then your spouse  
24 can use the hours just like the unused sick leave at retirement  
25 program, if it's in the line of duty.

00286

1           Q     So if an employee quits or is terminated or dies are  
2     there any rights that he or his family has with the exception  
3     of the public -- like in the line of duty service to the 1600  
4     accumulated hours?

5           A     No. But we do have a provision if you were to come  
6     back to State employment within one year we will reinstate  
7     those hours, but you don't get anything out of them if you  
8     don't meet that qualification.

9           Q     Are there options available with respect to the  
10    accumulated 1600 hours under existing law when an employee  
11    retires?

12          A     Yes.

13          Q     In order to have those options available to him, must  
14    the employee retire?

15          A     Yes.

16          Q     So if an employee were eligible for retirement but  
17    elected not to retire and take employment elsewhere would those  
18    options be available to that employee?

19          A     No.

20          Q     Now, upon retirement what are the options under the  
21    existing law with respect to the accumulated hours?

22          A     If we're talking about sick leave only, and I'm  
23    assuming we are, 25 percent of those the employee gets a  
24    choice, they can take the cash, they can roll it into a 401(k)  
25    or 457 or leave it in the program and buy insurance, eight



1 hours buys one month of insurance.

2 Q And when you say they can take the cash, how much  
3 cash can they take?

4 A Whatever the value of that 25 percent is. It would  
5 be the 25 percent of your hours times your hourly rate at the  
6 time of retirement.

7 Q And that goes out in the form cash. Do very many  
8 employees elect that option?

9 A Some do, yes. Most employees don't choose the cash.

10 Q The second option is to pay into the 401(k) plan?  
11 How would that work?

12 A That means you just fill out a new contract with Utah  
13 Retirement Systems for that specific amount to be taken out of  
14 your final paycheck and then it's taken before taxes are levied  
15 on your final check.

16 Q And that amount then goes into the employee's 401(k)  
17 plan to be used under that plan; correct?

18 A Correct.

19 Q The remaining hours can then be converted to purchase  
20 medical coverage, is that --

21 A With the deduction. There's the deduction in there,  
22 but essentially if you chose not to take the cash or you chose  
23 not to take the 401(k) then you could use those hours for  
24 insurance.

25 Q Okay. I'll walk you through an example in a moment,

1 but what is the deduction?

2 A The deduction is a 480 hour standard deduction that  
3 the current program requires all employees to take.

4 Q And that applies regardless of the age at which you  
5 retire?

6 A Yes.

7 Q Now, is there also a benefit in terms of automatic  
8 medical coverage under the existing law?

9 A There is.

10 Q And what is that benefit?

11 A You get five years or until you turn 65, whichever is  
12 less.

13 Q Is it age 65 or is it something else to qualify for  
14 Medicare?

15 A It's Medicare age, which is currently 65.

16 Q Okay. And if an employee chooses to retire at age 63  
17 and has two years before he would be eligible for Medicare, is  
18 the 480 hours still deducted?

19 A It is, yes.

20 Q Maybe this is obvious, but is the 480 hours  
21 equivalent to five years or 60 months of medical coverage?

22 A It is.

23 Q So is there any adjustment at all for the employee  
24 who is 63 for the fact that he only gets two years coverage but  
25 has to take a 480-dollar deduction -- or that 480-hour

1 deduction?

2       **A**     No, there is not.

3       **Q**     Now, with respect to House Bill 213, when it goes in  
4 effect, focusing first of all just on the hours that are  
5 accumulated through the end of this year, I want you to  
6 describe how the bill changes what. Is it your understanding  
7 that those hours would be referred to as program one hours  
8 under House Bill 213?

9       **A**     Yes, they're program one.

10       **Q**     Okay. With respect to program one hours, does the  
11 employee have the option to convert that amount into cash, any  
12 amount of that into cash?

13       **A**     No.

14       **Q**     That's completely eliminated?

15       **A**     Yes.

16       **Q**     With respect to those -- the contribution to the  
17 401(k) plan, is that still -- is that option still available to  
18 the employee?

19       **A**     It's required under the new program.

20       **Q**     Is there a limit on how much will be deducted as a  
21 401(k) contribution?

22       **A**     Yes.

23       **Q**     What is the limit?

24       **A**     The limit for next year, and this is different from  
25 what's in the slide because we just got new information for

1 what the limits will be next year, but it will be your annual  
2 income in the same year you retire or if you're under 50 it's  
3 44,000 between you and your employer. If you're over 50  
4 because there's some catch-up provisions, it's 49,000.

5 Q So just walk us through the procedures. First thing  
6 you do is you take the -- well, is there a requirement that you  
7 must go to the program one hours first?

8 A No.

9 Q Do you recall whether the -- let me ask you to turn  
10 to Exhibit No. 2 in your book. Actually, it's Exhibit No. 1.

11 Do you recognize that document?

12 A Yes.

13 Q Is it something that you are familiar with?

14 A Yes.

15 Q And what do you understand Exhibit 1 to be?

16 A This is the latest enrolled copy of House Bill 213.

17 Q If you would turn over to page 3 of Exhibit 1, the  
18 second to the last paragraph at the bottom of the page which is  
19 labeled 67-19-14.4 (3). Would you read that aloud for us?

20 A It says, "For purposes of Section 67-19-14 through  
21 67-19-14.4 the most recently earned converted sick leave or  
22 sick leave hours shall be used first when an employee uses  
23 converted sick leave or sick leave hours."

24 Q Does that provision affect which program hours will  
25 be used to contribute to the 401(k) plan?

00291

1           **A**     No.

2           **MR. HATHAWAY:** Object, calls for a conclusion of law.

3           **THE COURT:** Well, I don't know that it calls for a  
4 conclusion. It says what it says. I don't know what you want  
5 her to tell us, Mr. Waddoups.

6           **MR. WADDOUPS:** Really I'll withdraw the question and  
7 revise it.

8           **THE COURT:** Okay.

9           **Q**     **(BY MR. WADDOUPS)** As you apply or have been advised  
10 that you intend to apply 213, does that relate in any way to  
11 the deduction of the 25 percent?

12          **A**     No, this is in reference to when an employee actually  
13 needs to use some of the hours to call in sick or vacation  
14 time.

15          **Q**     Okay. Would you turn over to the next page, page 5,  
16 and look at subsection (3). That provision reads, "If the  
17 amount calculated under subsection 2(a) exceeds the federal  
18 contribution limitations the employee unused accumulated sick  
19 leave hours representing the excess shall be used for the  
20 purchase of continuing medical and life insurance benefits  
21 under (4)." As applied by the Human Resource Management  
22 Department, does that affect the number of hours that are  
23 contributed to the 401(k) plan?

24          **A**     It does, yes.

00292

25          **Q**     How does it -- how do you apply that provision?

1           A     Because it's possible that the amount that -- the 25  
2 percent, the dollar value of that 25 percent could exceed the  
3 IRS maximum which we cannot do, so if that were to occur the  
4 unused portion that could not be placed in the 401(k) would be  
5 left in the program, and since we're talking about program one  
6 here it would be used for purchasing additional medical and  
7 life insurance.

8           Q     Okay. And as that provision is applied, does that  
9 affect how many hours will in fact be contributed to the 401(k)  
10 plan?

11          A     It does.

12          Q     Now, with respect to the priority or -- which  
13 Mr. Hathaway asked you some questions about -- as to the order  
14 in which benefits are looked at or applied for purposes of the  
15 401(k) contribution, would you explain to the court how you do  
16 that.

17          A     The order was determined by the governor because it  
18 wasn't stipulated in the bill, the order. So what will happen  
19 is that if an employee chooses to place any of their own funds,  
20 either from their wages or from the value of their cashout into  
21 the 401(k), that will happen first. Then they'll go to the  
22 program two hours, the 25 percent to program two, and place  
23 that in second, and then they'll go to program one and place  
24 that last. 00293

25          Q     Now, Mr. Hathaway asked you some questions about

1 whether that's in the rules and you testified it's not in the  
2 rule; correct?

3       **A**     Correct.

4       **Q**     And he also pointed out that House Bill 213 has not  
5 become effective so you actually haven't applied this rule;  
6 correct?

7       **A**     Correct.

8       **Q**     In terms of discussing with the employees the  
9 application of it, have you advised them of this direction from  
10 the governor?

11       **A**     Yes.

12       **Q**     Now, with respect to -- maybe it would be useful to  
13 just go through a practical example.

14               I've placed in front of you a document that's been  
15 marked as Defendant's Exhibit No. 3. Did you prepare this  
16 document?

17       **A**     I did.

18       **Q**     Would you tell -- without going into the details,  
19 first of all, tell the court what it is.

20       **A**     It's a document that shows Roe Plaintiff No. 2,  
21 Robert Andersen, and how each of the different programs, the  
22 current program and the new program would apply to him in  
23 different years and different months of those years.

24       **Q**     And in preparing this document have you applied House  
25 Bill 213 as you now understand the State's interpretation to

1 be?

2 A Correct. Yes.

3 Q There are some assumptions stated in the footnotes.  
4 I believe you testified earlier as to a different exhibit that  
5 you did not prepare those assumptions?

6 A My recollection is that counsel provided me with 1, 2  
7 and 4, and we worked together on footnote 3.

8 Q Did you use these assumptions in terms of applying  
9 the bill?

10 A Yes.

11 MR. WADDOUPS: Okay. We would offer Exhibit No. 3 as  
12 an example of how House Bill 213 may apply under the various  
13 scenarios presented in the bill or in that document.

14 THE COURT: Mr. Hathaway, any objection?

15 MR. HATHAWAY: I'm sorry, this is Defendant's 3?

16 MR. WADDOUPS: Yes.

17 MR. HATHAWAY: I thought -- if I'm not mistaken, Your  
18 Honor, I think we already marked it as Defendant's 2, if I  
19 could approach.

20 THE COURT: I thought it was a different one, wasn't  
21 it?

22 MR. HATHAWAY: I'm sorry.

23 MR. WADDOUPS: It's essentially the same but there  
24 are a few minor changes what were made in it, and this was the  
25 version that was attached to Ms. Price's affidavit.

00295



1           MR. HATHAWAY: And the purpose of it being offered,  
2 Your Honor?

3           MR. WADDOUPS: It's being offered for the purpose of  
4 showing how -- under the scenarios presented in the document  
5 how the department applies House Bill 213 compared to the  
6 existing program.

7           MR. HATHAWAY: No objection, Your Honor.

8           THE COURT: Defense Exhibit 3 is received.

9           (Defendant's Exhibit No. 3  
10 was received into evidence.)

11          Q       (BY MR. WADDOUPS) If you would start, Ms. Price,  
12 with the first column that says Current Program, and it might  
13 be most useful for you to walk through each line and then just  
14 explain the current program versus House Bill 213 and the  
15 application as you've applied it.

16          A       Okay. The first column, current program May 1st of  
17 2007, from the complaint this was when the particular Roe  
18 plaintiff wanted to retire, so we used that date. If you leave  
19 the current program in place in 2007 the accumulated sick leave  
20 balance is 2300 hours. The next two Roes are not a part of the  
21 current program so they're not factored in here. The 25  
22 percent is there.

23          Q       Let me back you up just on those first -- those next  
24 two Roes. Mr. Andersen in this particular could elect to take  
25 25 percent of those hours under the existing law and put them

1 in his 401(K)?

2 A He could, yes. We're assuming he wants insurance.

3 Q And that would -- okay, the next -- go ahead and  
4 proceed with the --

5 A Then comes the automatic 480 hour deduction that  
6 every employee has to take, leaving him with 1820 hours. If  
7 you divide that by eight, this employee can purchase 228 months  
8 of additional insurance with his unused sick leave. He gets  
9 the full five years from the State in the five-year benefit, so  
10 that's 60 more months, so he would have a total months of  
11 insurance of 288, there would be no contribution to the 401(k)  
12 because he chose insurance, but then there's the potential tax  
13 liability from constructive receipt that would have to be  
14 placed for the fact that he did choose insurance of \$4,127.02.  
15 So the end result is that what he can purchase is 228 months of  
16 insurance and then there is always a potential tax liability of  
17 4,127.02.

18 Q Just so we're clear, you're not testifying that that  
19 in fact would be the tax liability but that's simply if you  
20 make these assumptions?

21 A Correct.

22 Q Now, compare how that would change under House Bill  
23 213 if it were to go into effect on that same retirement date.

24 A If you take the same retirement date of May 1st of  
25 2007, the same 2300 hours, 25 percent of 2300 hours is 575

1 hours that would have to be mandatory placed into the 401(k),  
2 leaving a subtotal of 1725. The automatic deduction in 2007 is  
3 only 384 because being phased out, leaving a subtotal of 1341.  
4 Divide that by eight, buys 168 months of insurance. And the  
5 State-paid insurance benefit in months is only 48 because that  
6 is also being phased out, it's only four years for 2007. So  
7 the total months of insurance this employee would have is 216.  
8 They would also have \$14,909.75 into a 401(k) contribution, no  
9 tax liability because there was no choice, and leaving him with  
10 a total months of additional insurance from sick leave is 168  
11 months that he can purchase on his own and 14,909.75 into the  
12 401(k).

13 Q Without walking through each line, necessarily,  
14 explain what the difference would be if Mr. Andersen under the  
15 interpretation by the department were to choose to retire on  
16 January 2nd of 2007.

17 A Under current program or new program?

18 Q Under the new program.

19 A Under the new program if you were to leave on  
20 January 2nd you'd have the same 2300 hours, the same 25 percent  
21 of those hours is 575, just like in the prior example, but he  
22 would get all of those hours back, because we're assuming that  
23 the employee who wants to maximize insurance will place as much  
24 of their own income in the 401(k) as they can on their own,  
25 that's the first thing that's taken into the 401(k). The

1 second thing that goes into the 401(k) is program two, and  
2 hopefully that's enough money to fill up the 401(k) to meet the  
3 IRS maximum so that when they get to these 575 hours they don't  
4 have to go in there at all, leaving him with 2300 hours, the  
5 deduction that year is 384, leaving 1916, divide that by eight  
6 purchases 240 months of insurance. He would receive the four  
7 years from the State, so 48 more months, total of 228 months of  
8 insurance, no 401(k) contribution for program one because that  
9 was maxed out, no potential tax liability from constructive  
10 receipt, and then the total months that he can purchase end up  
11 being 240 and then there's no additional benefit or harm.

12 Q Let me see if I can clarify some things that came  
13 from Ms. Andersen's testimony this morning.

14 If the employee retires on January 2nd, 2007 and  
15 takes his annual leave in terms of cash, is that treated as  
16 compensation in the year 2007?

17 A It is, yes.

18 Q So in that case, if that income were not contributed  
19 to the 401(k) plan, some hours would have to be deducted from  
20 the accumulated hours to offset that amount; correct?

21 A Most likely, yes. It helps you to max out placing  
22 your own money in there, if you don't do that.

23 Q When you say your own money, that could be the  
24 converted annual leave hours?

25 A Yes.

00299

1           **Q**     This would be up to the employee to choose whether  
2     that was in his best interest or not his best interest?

3           **A**     Yes.

4           **Q**     Now, without going through the same amount of detail,  
5     could you just highlight what the difference would be if  
6     Mr. Andersen were to choose to retire a year later in January  
7     of 2008?

8           **A**     In January of 2008 under the new program he actually  
9     ends up with more insurance that he can purchase on his own,  
10    because if you go to the line about the automatic deduction  
11    it's only 288 in 2008. So he takes less of a deduction there,  
12    but he also gets only three years of the insurance because that  
13    portion is also being phased out, so he ends up being able to  
14    purchase 252 months of insurance.

15          **Q**     In that scenario would there be program two hours  
16    that would be applied?

17          **A**     Yes. We're assuming that this employee again puts as  
18    much of his own income as he can into the 401(k) and that  
19    there's enough from program two to make up any difference if  
20    there is any so program one does not have to be touched at all.

21          **Q**     As you understand the statute, is there -- how are  
22    program two -- do you look first at program two hours and then  
23    to program one hours in order to do the 25 percent reduction?

24          **A**     Yes.

00300

25          **Q**     Ms. Andersen testified this morning that she

1 understood that it was 25 percent taken out of first -- two  
2 hours, 25 percent out of program one hours, 25 percent out of  
3 what other hours. Is that how the agency applies the statute?

4 A No, it will be your own money first, program two  
5 second, program one third.

6 Q If there's enough program two hours to make the full  
7 contribution there is no deduction from the program one hours;  
8 is that correct?

9 A Correct.

10 Q Now, just as a last scenario with respect to  
11 Mr. Andersen, would you walk the court through what the  
12 difference would be if Mr. Anderson chose to retire when he  
13 reaches age 65. I think that's the last page of the exhibit.

14 A So in 2012?

15 Q Yes.

16 A In this case, there is no automatic deduction because  
17 it is completely phased out by 2011. So he loses no hours in  
18 the deduction. So the 2300 are still protected because his own  
19 contributions to the 401(k) and contributions from program two  
20 have satisfied the IRS limit. Divide those by eight, he can  
21 purchase approximate 288 months of insurance. There is no free  
22 insurance as part of this program any longer because that will  
23 have been phased out. So he ends up with 288 months of  
24 insurance and no additional benefit or harm. 00301

25 Q Now, in this particular case, is House Bill 213 a

1 benefit to Mr. Andersen?

2 A Yes, it is if he wants insurance.

3 Q Now, with respect to employees who are over the age  
4 of 65 at present, does House Bill 213 generally benefit them or  
5 make them worse off?

6 A It benefits anybody over the age of 60 the longer  
7 they can wait, because of the reduction of the automatic  
8 deduction. Every year that is getting reduced by 96 hours, so  
9 it's less hours they lose to the State that they're not getting  
10 anything back. It's 96 more hours per year they can buy more  
11 Medicare supplement insurance.

12 MR. WADDOUPS: Your Honor, we're just a little bit  
13 after 12:00.

14 THE COURT: You're okay.

15 Q (BY MR. WADDOUPS) Let me place in front of you --  
16 before we leave this, would you explain to the court what  
17 converted sick leave hours are?

18 A Converted sick leave is a program to reduce  
19 employees' usage of sick leave because sick leave is a  
20 contingent benefit, it's State property right, it's not an  
21 employee property right. And in order to reduce that and save  
22 the State money, they give you an incentive to try to not use,  
23 that if you don't use your sick leave we'll give you some of it  
24 back that you can use for your own purposes and that you can  
25 then cash out when you terminate or use at retirement.

1           So you start the year -- to qualify for the program  
2   you have to start the first pay period of the year with at  
3   least 144 hours of sick leave. If you don't have that, you  
4   have to wait another year. Then you work through the entire  
5   calendar year and the payroll system looks back at your leave  
6   usage for that whole year and what you've earned into the sick  
7   leave program. Every employee earns 104 hours a year into sick  
8   leave, so it takes the 104, subtracts whatever you've used that  
9   year, subtracts 64, and then if there's anything left, that's  
10   what will convert. So in a sense, if you don't use any of your  
11   sick leave, at the end of the year 40 of those hours will get  
12   placed into converted sick leave which you now have a different  
13   value for.

14        Q     Is there a maximum of the number of sick leave hours  
15   that can be converted?

16        A     Forty per year.

17        Q     And is there a total maximum that can be converted?

18        A     Three-hundred-twenty.

19        Q     And once an employee has 320 converted -- hours of  
20   converted sick leave, what can the employee do with those  
21   converted sick leave hours?

22        A     They can use them at any time for whatever purposes  
23   they want, as long as they have their supervisor's approval to  
24   be gone, for sick or for vacation purposes, whatever reason  
25   they choose. If they terminate State employment those are



1    cashed out and then at retirement the particular program that's  
2    in place at the time they retire will dictate what happens with  
3    those hours at that point.

4           Q     So an employee has annual leave that they can  
5    accumulate up to a maximum of 320 hours; is that correct?

6           A     Correct.

7           Q     And they have sick leave that can be converted up to  
8    a total of 320 hours; correct?

9           A     Converted sick leave, yes.

10          Q     And with respect to the annual leave, they can  
11   convert that to cash upon leaving employment?

12          A     Correct.

13          Q     And the sick leave they can convert to cash upon  
14   leaving employment; correct?

15          A     Correct.

16          Q     And they can do that regardless of whether they  
17   retire or don't retire?

18          A     Correct.

19          Q     Does House Bill 213 affect any of those two programs  
20   in any way?

21          A     House Bill 213 did change the converted sick leave  
22   because it now requires that 25 percent of those hours be  
23   placed in the 401(k) and the remainder will be used for  
24   insurance if they're program one.

25          Q     So upon retirement you would go to the converted sick

1 leave as one of the pools which you would go to to satisfy the  
2 401(k) contribution; correct?

3 A Correct.

4 Q If you have program one hours that are sufficient to  
5 make the 401(k) contribution does it affect the converted sick  
6 leave hours?

7 A Will you say that one more time?

8 Q Sure. When you apply the 401(k) contribution  
9 priorities, in what order do you look to the converted sick  
10 leave?

11 A The converted sick leave -- well, it goes program two  
12 first, then program one, and the whole 25 percent of whatever  
13 you have in sick and converted sick at that point will be added  
14 together. They'll take what they can if they can take any of  
15 that and whatever hours are left just stay in the program.

16 Q So under the scenario under House Bill 213, if there  
17 is sufficient program two hours to make the maximum 401(k)  
18 contribution is there an effect on the converted sick leave?

19 A No, they would all buy insurance if that were the  
20 case.

21 Q Okay. Or could be cashed out?

22 A They can't be cashed out if you terminate before  
23 retirement.

24 Q So if you retire you don't get the cash for the 320  
25 hours?

1           **A**     Correct.

2           **Q**     Have you prepared similar charts for each of the Roe  
3 plaintiffs in this case as to the one for Mr. Andersen?

4           **A**     Yes.

5           **Q**     Are the effects the same with respect to each of  
6 those?

7           **A**     Yes.

8           **MR. WADDOUPS:** Your Honor, we would offer them to  
9 place them in the record. I don't know that I need to spend  
10 time with them except for the one plaintiff that's remained  
11 anonymous, we would hold that one back until that issue is  
12 resolved. And if it's acceptable to the Court I'll just do  
13 that after we --

14           **THE COURT:** Do you have any objection to that,  
15 Mr. Hathaway?

16           **MR. HATHAWAY:** No.

17           **Q**     **(BY MR. WADDOUPS)** Just a few more questions. With  
18 respect to the programs that you made to State employees you've  
19 told us that you talked about the fact of the impact of the IRS  
20 regulation that's shown on slide two; correct?

21           **A**     Correct.

22           **Q**     Did you also talk about the fact -- did you talk  
23 about the fact that it may affect the deduction for the 401(k)  
24 plan depending when the employee retired during the year?

25           **A**     Yes.

00306

1 Q What did you say on that subject?

2 A When we got to the particular slide that talks about  
3 the IRS limits for the year, at that point we mentioned that  
4 because part of the statute reads up to your annual income in  
5 the year you retire that if you were to retire earlier in the  
6 year your income would be far less than that \$42,000 maximum  
7 and that it would be to your advantage if insurance was your  
8 goal to leave earlier because your 401(k) limit would be much  
9 smaller and if you could place as much of your own income into  
10 that account as possible that then they would go to program two  
11 and take what they could and go to program one and hopefully at  
12 that point we've satisfied the IRS maximum and they wouldn't  
13 have to take the 25 percent from your program one.

14 Q Was it your practice to explain this effect in each  
15 of the presentations?

16 A Yes.

17 Q When did you start making those presentations?

18 A It was right after the bill passed, I don't know the  
19 particular day.

20 Q Can you remember the month?

21 A I don't. I'm sure it was March.

22 Q Sometime in March?

23 A Yes.

24 Q And through what months did you make those  
25 presentations?

00307

1           **A**     All of March, April and May, into the first two weeks  
2 of June. And then on a sporadic basis as requested.

3           **Q**     Did you discuss this effect of retiring earlier in  
4 the year in each of those presentations through that entire  
5 period.

6           **A**     I did through -- in all the ones I presented at.

7           **Q**     Is this something that just came up after this  
8 litigation was filed?

9           **A**     This was something that we knew because it was  
10 written in the bill that there were IRS maximums and that we  
11 had talked to Craig Stone at URS that we knew there was  
12 maximums. The order, the particular order did not get worked  
13 out until into our presentations as Jeff had a chance to go and  
14 talk to the governor about what the order would be.

15          **Q**     When you say "Jeff," you mean Jeff Herring?

16          **A**     Yes.

17          **Q**     And when you receive calls from employees about House  
18 Bill 213 is it your practice to explain that it may affect a  
19 reduction depending when they retired during the year?

20          **A**     When I take a call from an employee, they typically  
21 know when they want to retire and we go through those numbers  
22 and then I explain to them that there's a different way of  
23 calculating that based on going in a different time of the  
24 year. And if they want me to go through that, I will walk them  
25 through that; if they don't, I don't.

1           Q     Did you have -- is there a website that explains the  
2 House Bill 213 effects?

3           A     Yes, DHRM's website.

4           Q     Were you involved in preparing that website?

5           A     The actual website, no.

6           Q     What's displayed on the website?

7           A     Yes, I was involved in some of those documents that  
8 are on there.

9           Q     As the website has now been on the system, does it  
10 account for the month and the year in which the employee  
11 retires?

12          A     The formula -- the worksheet that's out there right  
13 now just specifically goes by how many hours you have and  
14 here's the formula and it doesn't account for your income in  
15 that year. We're working with the division of finance right  
16 now to get something that will calculate that, but it's so  
17 individualized and because it's based on financial information  
18 instead of just your hours we haven't had a way to this point  
19 to really do that very well. The worksheet out there right now  
20 just goes by how many hours you have and here's the formula.

21          Q     Is it the plan within your department to post a  
22 website page that will have it calculated that adjusts for the  
23 month in which the amount of contribution that's made to the  
24 401(k) plan?

25          A     Yes.

00309

1           **Q**     Do you have any knowledge as to when that will be  
2 available to go public?

3           **A**     We're testing the worksheet right now and it will  
4 just depend on, you know, if things go well. I'm hoping that  
5 that will be usable next week, unless we run into a lot of  
6 problems with it.

7           **MR. WADDOUPS:** May I have just a moment, Your Honor?

8           **THE COURT:** Uh-huh.

9           **Q**     **(BY MR. WADDOUPS)** Ms. Leithead wants to make sure  
10 we've made this point clear.

11                   If an employee retires under House Bill 213, is there  
12 any difference as to their -- let me back up and start over.  
13 If an employee leaves employment without retiring with House  
14 Bill 213 going into effect, is there any impact on the ability  
15 to cash out either annual leave or sick leave?

16           **A**     No.

17           **MR. WADDOUPS:** Okay. Nothing further.

18           **THE COURT:** Mr. Hathaway, redirect?

19           **MR. HATHAWAY:** Your Honor, I probably have half an  
20 hour of --

21           **THE COURT:** We might as well finish with this  
22 witness, if it's okay with everybody.

23           **MR. HATHAWAY:** Okay. If the Court would like to plow  
24 ahead.

1 BY MR. HATHAWAY:

2 Q Ms. Price, in discussing with us how it was that you  
3 and the other two members of DHRM interpreted House Bill 213,  
4 you never consulted with a representative of the legislature?

5 A I did not, no.

6 Q No one in your group did?

7 A I don't know if they did.

8 Q You never invited staff members to come and meet,  
9 discuss the House Bill 213?

10 A The only thing I can recall is that Con Whipple sent  
11 our presentation over to Representative Clark. But  
12 discussions, invitations, I am not aware of.

13 Q No suggestions or changes were ever made by  
14 Mr. Clark --

15 A He did make one suggestion that we show on the  
16 scenarios how much an employee would have accumulated in total  
17 sick leave, not just how much they had at retirement, he wanted  
18 to show how much you had and that some employees had in fact  
19 used some of those hours during employment, so we added that  
20 for him.

21 Q Now, let's take a look at -- I believe it's  
22 Defendant's Exhibit 3. It relates to Mr. Anderson.

23 The automatic deduction of 480 hours that you made  
24 reference to links directly to the five years of coverage  
25 provided by the State; correct?

00311



1           **A**     Well, employees like to think that it's linked, but  
2     it's just -- the deduction's just a deduction and the insurance  
3     is just another part of the statute that depends on your age  
4     whether you get that or not. But when you talk to employees,  
5     they like to link those two together.

6           **Q**     Let me ask this. Under House Bill 213, in the year  
7     2007 you lose one-fifth of the five years of coverage and, by  
8     the same token, your deduction is decreased by one-fifth?

9           **A**     Correct.

10          **Q**     And it continues every year for the succeeding five  
11     years until 2011 when you receive no insurance from the State  
12     and you receive no deduction?

13          **A**     Correct.

14          **Q**     So you can't fault somebody if they consider those  
15     two items to be linked; correct?

16          **A**     I can totally understand why people link them, yes.

17          **Q**     By the way, referring to the first page of  
18     Defendant's Exhibit 3 under the column, May 1st, 2007, under  
19     House Bill 213, you have added -- you start by noting that he  
20     would be entitled to -- that is, Mr. Andersen would be entitled  
21     to 168 hours of sick leave at the eight-to-one ratio; correct?

22          **A**     Correct.

23          **Q**     And beneath that you add \$14,909.75 deposited into  
24     his 401(k); correct?

25          **A**     Correct.

00312

1 Q And that's a mandatory deposit?

2 A Yes.

3 Q He might go out and use that to buy insurance?

4 A He could, yes.

5 Q Based on the rates that you received from PEHP of

6 \$760 a month, that total amount would be worth considerably

7 less than the 60-hour discrepancy under the current program as

8 compares to House Bill 213?

9 A It would be, yes.

10 Q Now, moving to the next column, two columns, really,

11 and this probably applies to all of your calculations based on

12 a January retirement, you would agree with me, wouldn't you,

13 Ms. Price, that by retiring on January 2007 in order to

14 maximize the benefits, if that's what the goal is of the

15 retiree, their choices with respect to when they retire are

16 limited?

17 A Their choice of retirement date is limited.

18 Q And under the present program they are not?

19 A Correct.

20 Q Similarly, if -- under your scenarios for

21 Mr. Andersen as reflected on this exhibit, and I think the

22 principle applies to all of the scenarios that you developed,

23 in order to maximize the benefit, their choices are limited on

24 what they do with their annual leave; correct?

25 A Correct. They would need to place it in their

1 401(k) .

2 Q They couldn't cash it out?

3 A Correct. If insurance was their goal, they would  
4 want to place it in the 401(k) .

5 Q And if they cashed it out they'd receive their wage  
6 times the 320 hours and that would be included, that would  
7 increase, wouldn't it, the amount that was mandatorily  
8 transferred into their 401(k)?

9 A From their sick leave?

10 Q Yes.

11 A Yes.

12 Q So they're limited in what they can do with their  
13 accumulated annual leave at the time of retirement?

14 A Yes, if they're choosing insurance as their goal.

15 Q And there is no such limitation under the present  
16 act?

17 A Correct.

18 Q Whether or not insurance is available?

19 A Correct.

20 Q Further, they're limited, aren't they, in what they  
21 can use their converted sick leave for under House Bill 213?

22 A Yes.

23 Q House Bill 213 mandates that 25 percent will go into  
24 the 401(k)?

25 A It does.

00314

1           Q     Now, under the policy that's been adopted or at least  
2     been pronounced by Governor Huntsman it may fit in a priority  
3     so that it doesn't all get gobbled up, but in any event if  
4     there is any room left in what the compensation of that  
5     employee is at the end of the year it's going to go into the  
6     401(k)?

7           A     Correct.

8           Q     Further, as you mentioned, a person might be required  
9     to place their own personal money in order to cover that 25  
10    percent contribution?

11          A     They would not be required to do that.

12          Q     However, their choices of what they do with their  
13    personal money are limited if their goal is to maximize their  
14    insurance?

15          A     They would be choosing to place it into a 401(k),  
16    yes.

17          Q     And under the current program there's no such  
18    limitation of what the choices are?

19          A     Correct.

20          Q     And in a similar vein there are no limitations of  
21    what their choices are with respect to their converted sick  
22    leave under the present program?

23          A     Correct.

24          Q     Your assumptions upon which you reach your  
25    conclusions in all of these include those of footnote number 1

1 and if I just read the -- footnote 1, I'll just read the last  
2 line of that, "This example further assumes a sufficient level  
3 of employer nonelective contributions, including contributions  
4 from program two hours to fully offset the minimum amount of  
5 any remaining noncontributed compensation for the year."

6 Did I read that correctly?

7 A Correct.

8 Q There' one other thing that it assumes that you  
9 didn't list, doesn't it?

10 A I don't know. This footnote was provided to me by  
11 counsel.

12 Q It assumes, doesn't it, that this pronouncement from  
13 Governor Huntsman remains in effect?

14 A Yes, it would need to remain that way, yes.

15 Q Because if you open up and read House Bill 215 as  
16 we've reviewed before, if you want to look at it, it says 25  
17 percent of your program two sick leave subject to the IRS  
18 requirements will be deposited into 401(k)?

19 A Yes, it does.

20 Q And it says 25 percent of your unused sick leave  
21 subject to the IRS requirement shall be deposited into your  
22 401(k)?

23 A It does.

24 Q And it says 25 percent of your program one  
25 accumulated sick leave and hours subject to the IRS rules shall

1 be deposited into your 401(k)?

2 A Yes.

3 Q So you don't fault Ms. Andersen for interpreting that  
4 to say, Well, gee, 25 percent from all these I guess you'd get  
5 a prorata cut from each one, that's certainly a reasonable  
6 interpretation, isn't it?

7 A Yeah.

8 Q And that's precisely why you sought the direction of  
9 the governor; correct?

10 A Correct.

11 Q And it surely is something the legislature could  
12 address if they chose to at some future sessions?

13 A They could, yes.

14 Q By the way, this policy you're referring to, it  
15 hasn't been written down anywhere, has it?

16 A Not that I've seen.

17 Q You don't have a memo from the governor's office?

18 A I don't have anything in writing.

19 Q You haven't reduced it to any kind of a policy that  
20 you're going to use internally in advising potential retirees?

21 A Not in a policy, just in our business practice, our  
22 discussion with employees and our working on the worksheet with  
23 the division of finance all implement everything that way.

24 Q So basically you expect as you sit here today the  
25 public employees of the State of Utah just to rely on your word

1 that that's how this statute --

2 A I'm relying on the word of the governor.

3 Q Not written out anywhere, just what you've heard his  
4 word to be?

5 A Correct.

6 Q By the way, you weren't present when he articulated  
7 this priority, were you?

8 A I was not.

9 Q There's another assumption that you make in all of  
10 your scenarios that you've put together purportedly maximizing  
11 benefits, and let's refer to Defendant's 3. With regard to  
12 Mr. Andersen, you're assuming that he's able to work until  
13 January of 2012, aren't you?

14 A Yes.

15 Q And you're assuming similarly he's able to work until  
16 whatever the years are that you ultimately plug in in the case  
17 of each one of our public employee plaintiffs?

18 A Yes.

19 Q But you'd agree with me that under the present  
20 program there's no consequence to whenever it is they retire?

21 A Not under this program, no.

22 Q With respect to counsel's questions about some of the  
23 provisions of House Bill 213 that you have in front of you,  
24 there was one particular reference that purported to address  
25 the use of program one sick leave. Just so we're clear, I just

1 want to make sure we're clear on this, this doesn't make  
2 reference to this priority that we're referring to, it makes  
3 reference to employees during the course of their employment  
4 using the sick leave for what would otherwise be a qualified  
5 sick leave day?

6 A Yes, correct.

7 Q Nothing to do with this policy?

8 A Correct.

9 Q Under the present program, I believe, if I understood  
10 your testimony correctly, a public employee can elect if they  
11 choose to take up to 25 percent of their unused sick leave and  
12 put it into their 401(k)?

13 A They can.

14 Q They can -- and that's their option?

15 A Yes.

16 Q You testified that, however, in your experience  
17 that's not the majority -- the majority of public employees  
18 seek to maximize these benefits, as you've --

19 A Yes.

20 Q -- put it.

21 In discussing the IRS rules that you did review for  
22 the purposes of preparing your presentations and interpreting  
23 House Bill 213 as it applies to individual public employees,  
24 you mentioned the 44,000, up to 44,000 or up to 49,000 in the  
25 event of an employee over the age of 50?

00319



1           **A**     Yes.

2           **Q**     Do I understand you correctly the point is under your  
3 scenario that you want to retire as early as you can so that  
4 you decrease what 25 percent -- actually, what you're  
5 emphasizing is the "subject to IRS limitation" language of the  
6 act?

7           **A**     Yes.

8           **Q**     And in so doing you effectively create this loophole  
9 that you referred to, this January 2nd loophole where an  
10 employee can satisfy the 25 percent mandatory contribution but  
11 at the same time minimize the amount that in fact is deposited  
12 by --

13          **A**     Yes.

14          **Q**     -- virtue of these IRS rules?

15          **A**     Yes.

16          **Q**     Now, you'd agree that the purposes that you have  
17 articulated in your slide for House Bill 213 are contrary or  
18 would be run afoul of by an employee taking advantage of this  
19 loophole, as you described it?

20          **A**     I'm not really sure how to answer that, because in  
21 the bill itself it addresses that it can't be over the IRS  
22 maximum, so I'm assuming the legislature knew that not all of  
23 the 25 percent in every case was going to go in there. I can't  
24 speculate on how --

00320

25          **Q**     My question is, considering the purposes that you've

1 put in your presentation for this bill as you understand the  
2 bill --

3 A Uh-huh.

4 Q -- that would not be accomplished by an employee  
5 availing themselves to the loophole as you described?

6 A It would limit it. It would limit it.

7 Q You've repeatedly referred to certain benefits  
8 provided public employees if insurance is their purpose, if  
9 they want to maximize their insurance benefit. You'd agree  
10 with me that in addition to their desire to maximize their  
11 insurance benefit they're also going to have to be willing to  
12 forfeit their right to receive cash at retirement?

13 A They would have to choose the 401(k), yes.

14 Q And similarly you'd agree that they're going to have  
15 to be willing to forfeit their ability to choose when it is  
16 they can retire?

17 A They would just have to choose to retire earlier in  
18 the year.

19 Q Their options, in any event, would be limited?

20 A Yes.

21 Q Similarly, they're going to have to sacrifice the use  
22 prospectively of any program two accumulates --

23 A If they wanted to save those hours to reach the  
24 401(k) max and get the health care reimbursement money, yes,  
25 they would want to save those.

00321

1           Q     And they're going to have to be willing to forfeit  
2 their choice in regard to their use of the converted sick  
3 leave?

4           A     Well, under the new program they don't have a choice.

5           Q     They do under the old?

6           A     Right, yes.

7           Q     But that's my next question, all of those that I  
8 referred to are options to employees under the present program?

9           A     Okay.

10          Q     You mentioned that there might be some additional  
11 advantage to employees older than 65 under the existing  
12 program?

13          A     Yes.

14          Q     How many employees is that?

15          A     I don't know how many employees we have over 65, off  
16 the top of my head.

17          Q     Do you know a percentage?

18          A     I don't know that.

19          Q     In regard to the presentations that you made upon the  
20 direction of your -- of the head of the Department of Human  
21 Resource Management, and again I want to make sure that we're  
22 clear on this, you explained generally the advantage of  
23 possibly retiring earlier in the year?

24          A     Yes.

00322

25          Q     You didn't state specifically retire January 2nd, you

1 maximize your benefits?

2       A     In the examples I used to generally explain it I  
3 pretty much said retire January 2nd and gave a general overview  
4 of how it would work.

5       Q     Now, you also explained that when you receive  
6 telephone calls you will occasionally -- or you'll explain to  
7 them that if they want to maximize their benefits they may want  
8 to consider that and then if they request of you you'll provide  
9 the scenarios of retiring earlier in the year; correct?

10       A     Uh-huh.

11           THE COURT: Is that a yes?

12           THE WITNESS: Yes. Sorry.

13       Q     (BY MR. HATHAWAY) You'll agree with me, though, that  
14 of those prospective retirees that you discussed these options  
15 with, after they told you what their intended retirement date  
16 is and you provided them that option you've had some explain to  
17 you, haven't you, that they don't want to take advantage of  
18 that option?

19       A     Yes.

20       Q     In other words, you've had some tell you that they  
21 want to go with the retirement date they've set for themselves?

22       A     Yes.

23           MR. HATHAWAY: Could I have just a moment?

24           THE COURT: You may.

00323

25       Q     (BY MR. HATHAWAY) Referring you back to the slide

1 presentation.

2       **A**     Which exhibit is that?

3       **Q**     I'm sorry. I think it's 16.

4               Ms. Price, could you show us which slide it is that  
5 you used as your segue to engage in a discussion about the  
6 advantages of retiring earlier in the year?

7       **A**     It's the slide on page 5, the middle slide.

8       **Q**     That would be your spring board to discussing timing?

9       **A**     Yes.

10       **Q**    Now, included in your presentation are several  
11 scenarios; correct?

12       **A**     Correct.

13       **Q**     And these were part of your presentation?

14       **A**     Yes.

15       **Q**     And you used all of these and showed these -- in the  
16 25 or so, 25 or 30 presentations that you've made have you used  
17 those also in your discussions with individuals?

18       **A**     We don't use them in our phone discussions and there  
19 were some presentations where we didn't go through every  
20 scenario, we had a really small group and they were basically  
21 getting it, we didn't go through every scenario.

22       **Q**     In any event, these were those that were available  
23 for your use in the course of your presentation?

24       **A**     Yes.

00324

25       **Q**     It's true, isn't it, that not one of those runs a

1 scenario based on the January 2nd --

2 A It does not.

3 Q If I understood your testimony correctly also,  
4 Ms. Price, it was that the cost savings to the State under  
5 House Bill 213 are expected to come in over time, it's going to  
6 take a little bit of time for them to start --

7 A Correct.

8 Q It's true, is it not, that the effective date of  
9 House Bill 213 will itself cost the State more than continuing  
10 under the present program?

11 MR. WADDOUPS: Objection, foundation.

12 THE COURT: Sustained.

13 Q (BY MR. HATHAWAY) What do you base your statement on  
14 that the House Bill 215 is not going to reap benefits and  
15 savings to the State for several years?

16 A Because the people retiring in the next several years  
17 will have the bulk of their hours in program one, they'll have  
18 very little accrued in program two, and program two is really  
19 where the cost savings comes.

20 Q Did you conduct any research to make that  
21 determination?

22 A No.

23 Q Is it based on your own analysis of the statutory  
24 language?

00325

25 A Just based on the premise of how it works, the eight

1 hours buying a month of insurance is where the employees are  
2 going to have most of their hours, that's going to be more  
3 expensive than the dollar for dollar, and those first employees  
4 are not going to have many hours in the program that would go  
5 dollar for dollar.

6 Q Also part of the statutory language you discussed has  
7 this mandatory deposit into the 401(k); correct?

8 A Correct.

9 Q Right now that doesn't exist; true?

10 A Correct.

11 Q Based on your analysis have you made any sort of  
12 determination whether the now-mandatory 25 percent contribution  
13 is going to cost the State more money --

14 A I have not.

15 Q You haven't discussed with anyone, your supervisor or  
16 anyone within the department in preparing yourself to  
17 essentially be spokesperson for the State as relates to the  
18 application of House Bill 213 on whether or not its effective  
19 date will cost the State money?

20 A We have had discussions on that. We think that a lot  
21 of employees will retire the first week of January.

22 Q And consequently what effect will that have on cost  
23 to the State?

24 A We haven't really talked about what the cost  
25 implication would be, just the paperwork process.

00326

1           Q     Now, Ms. Price, when you first learned of the content  
2 of House Bill 213 in your role as -- was that -- the role  
3 before, you were the --

4           A     I was the compensation specialist.

5           Q     -- as the compensation specialist, as soon as you  
6 read it and reviewed it you recognized, did you not, that it  
7 was going to have an adverse effect on your personal retirement  
8 plan?

9           MR. WADDOUPS:  Objection, Your Honor, relevance.

10          THE COURT:  What's relevant to that?  I mean we all  
11 may feel that way, I don't know, but I don't think it's  
12 relevant in this case or the issues before us right now, her  
13 personal feelings about it.  Sustained.

14          MR. HATHAWAY:  That's all the questions I have.

15          THE COURT:  Okay.

16          MR. WADDOUPS:  Nothing further for this witness.

17          THE COURT:  All right.  You may step down.  Thank  
18 you.  We'll recess for the day, I presume, and reconvene on  
19 Wednesday morning at 9:00, next Wednesday.

20          MR. WADDOUPS:  It would be helpful, I don't know if  
21 Ben has a good judgement on this, it would be helpful to know  
22 if we can finish up on Wednesday.

23          MR. HATHAWAY:  I suspect I would be able to finish up  
24 on Wednesday. 00327

25          THE COURT:  Do you have some witnesses you're going



1 to call?

2 MR. WADDOUPS: Ms. Price was one of our witnesses and  
3 she's now finished, we have two additional witnesses, I think  
4 they'll be very limited.

5 THE COURT: We can shoot for that, but I believe we  
6 have a half day on the following Friday.

7 MR. WADDOUPS: Your Honor, a full day if we need it.

8 MR. HATHAWAY: I don't know if the Court has a --

9 MR. WADDOUPS: I can't remember whether we had a half  
10 day or a full day --

11 THE COURT: Let me tell you what I have. I don't  
12 have it in front of me, but I think you have a full day  
13 Wednesday and a half day on the following Friday. You would  
14 have had a whole day on Friday but I think I've plugged  
15 something in in the afternoon. But if we have to move it we  
16 will, because I think we need to conclude this hearing as soon  
17 as we can.

18 MR. HATHAWAY: Your Honor, what my plan and proposal  
19 would be is to finish up all of the evidence on Wednesday and  
20 perhaps come Friday morning and argue it.

21 MR. WADDOUPS: That works for me, it just would be  
22 helpful to know which way we're going to do it.

23 THE COURT: Let's do it that way and then that's  
24 good. Okay. Thank you.

25

00328

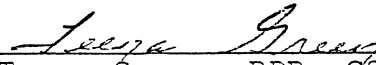
C E R T I F I C A T E

STATE OF UTAH           )  
                              :  
COUNTY OF SALT LAKE )

I, TEENA GREEN, RPR, CSR, do certify that I am a nationally certified reporter and a Certified Shorthand Reporter in and for the State of Utah.

That at the time and place of the proceedings in the foregoing matter, I appeared as the official court reporter in the Third Judicial District Court for the Honorable William W. Barrett, and thereat reported in stenotype all of the proceedings had therein. That thereafter, my said shorthand notes of the Second Trial Day were transcribed by computer into the foregoing pages; and that this constitutes a full, true and correct transcript of the same.

WITNESS MY HAND AND SEAL in Salt Lake City, Utah on this, the 9th day of November 2005.

  
Teena Green, RPR, CSR

00329

UNUSED SICK LEAVE AT RETIREMENT  
AMENDMENTS

2005 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: David Clark

Senate Sponsor: Beverly Ann Evans

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LONG TITLE

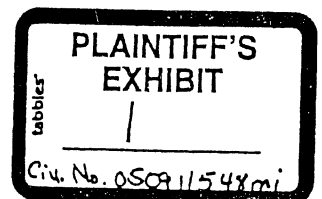
General Description:

This bill modifies the Utah State Personnel Management Act by amending unused sick leave at retirement provisions.

Highlighted Provisions:

This bill:

- ▶ provides that no additional converted sick leave can be added after January 1, 2014;
- ▶ provides that after December 31, 2005, new sick leave hours may not be accumulated for future use under the current Unused Sick Leave Retirement Option Program;
- ▶ provides a five-year phase out of:
  - the guaranteed continuing medical and life insurance benefits for retiring employees; and
  - the 480 hour reduction of unused sick leave;
- ▶ changes the name of the current program to Unused Sick Leave Retirement Option Program I;
- ▶ deletes the provision allowing "up to" 25% of unused sick leave under program I which may be cashed out upon retirement to requiring 25% of unused sick leave received as a contribution into a 401k defined contribution plan upon retirement;
- ▶ creates the Unused Sick Leave Retirement Program II for sick leave hours accumulated on or after January 1, 2006, which provides:
  - 25% of unused sick leave, upon retirement, shall be received as a contribution



into a 401k defined contribution plan; and

- participation in a benefit plan that provides for reimbursement for medical expenses using the remainder of unused sick leave hours at the employee's rate of pay at the time of retirement but not less than the average rate of pay as for employees who retired in the same state retirement system during the previous calendar year;

- allows employees to make a one-time election to transfer unused sick leave hours to the new program beginning January 1, 2011;

- the Division of Finance must develop and maintain a system of accounting for sick leave as necessary to implement these programs;

- the Utah State Retirement Systems must develop and maintain a program to provide a benefit plan that provides for reimbursement for medical expenses; and

- makes technical changes.

**Monies Appropriated in this Bill:**

None

**Other Special Clauses:**

This bill takes effect on January 1, 2006.

**Utah Code Sections Affected:**

**AMENDS:**

67-19-14, as repealed and reenacted by Chapter 28, Laws of Utah 2004

67-19-14.1, as enacted by Chapter 28, Laws of Utah 2004

67-19-14.2, as enacted by Chapter 28, Laws of Utah 2004

67-19-14.3, as enacted by Chapter 28, Laws of Utah 2004

**ENACTS:**

67-19-14.4, Utah Code Annotated 1953

**Uncodified Material Affected:**

ENACTS UNCODIFIED MATERIAL

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*Be it enacted by the Legislature of the state of Utah:*

Section 1. Section 67-19-14 is amended to read:

**67-19-14. Sick leave -- Definitions -- Unused sick days retirement programs --**

**Rulemaking.**

(1) As used in Sections 67-19-14 through ~~[67-19-14.3]~~ 67-19-14.4:

(a) "Continuing medical and life insurance benefits" means the state provided policy of medical insurance and the state provided portion of a policy of life insurance, each offered at the same:

(i) benefit level and the same proportion of state/member participation in the total premium costs as an active member as defined in Section 49-11-102; and

(ii) coverage level for a member, two person, or family policy as provided to the member at the time of retirement.

(b) "Converted sick leave" means leave that has been converted from unused sick leave in accordance with ~~[this section and]~~ Section 67-19-14.1 which may be used by an employee in the same manner as:

(i) annual leave;

(ii) sick leave; or

(iii) unused accumulated sick leave after the employee's retirement for the purchase of continuing medical and life insurance benefits under Sections 67-19-14.2 ~~[and]~~, 67-19-14.3, and 67-19-14.4.

(2) In accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, the director shall make rules for the procedures to implement the provisions of Sections 67-19-14 through ~~[67-19-14.3]~~ 67-19-14.4.

(3) For purposes of Sections 67-19-14 through 67-19-14.4 the most recently earned converted sick leave or sick leave hours shall be used first when an employee uses converted sick leave or sick leave hours.

(4) The Division of Finance shall develop and maintain a system of accounting for employee sick leave and converted sick leave as necessary to implement the provisions of

Sections 67-19-14 through 67-19-14.4.

Section 2. Section 67-19-14.1 is amended to read:

**67-19-14.1. Converted sick leave.**

(1) ~~[An]~~ Until January 1, 2014, an employee who has 144 hours of accumulated unused sick leave immediately prior to the beginning of a calendar year, may elect to convert any unused sick leave hours accumulated during that calendar year, in excess of 64 hours, to converted sick leave.

(2) The conversion is made at the beginning of the next calendar year for unused sick leave hours earned during a calendar year under Subsection (1).

(3) Converted sick leave hours;

(a) are not subject to the reduction provided under Subsection 67-19-14.2(4)(a)(ii)[-];

(b) that are not used prior to an employee's retirement date shall be used under the:

(i) Unused Sick Leave Retirement Option Program I under Section 67-19-14.2 if earned prior to January 1, 2006, unless the transfer is made under Subsection 67-19-14.4(1)(c); or

(ii) Unused Sick Leave Retirement Option Program II under Section 67-19-14.4 if earned on or after January 1, 2006.

Section 3. Section 67-19-14.2 is amended to read:

**67-19-14.2. Unused Sick Leave Retirement Option Program -- Creation -- Payout at retirement -- Continuing medical and life insurance benefits after retirement.**

(1) (a) There is created the "Unused Sick Leave Retirement Option Program I."

(b) An agency may offer the Unused Sick Leave Retirement Option Program I to an employee who is eligible to receive retirement benefits in accordance with Title 49, Utah State Retirement and Insurance Benefit Act.

~~[(c) An employee's participation in any part of the Unused Sick Leave Retirement Option Program is voluntary.]~~

(2) The Unused Sick Leave Retirement Option Program I provides that upon retirement an employee who was employed by the state prior to January 1, 2006:

(a) ~~[is paid]~~ receives a contribution under Subsection (3) for [up to] 25% of the

employee's unused accumulated sick leave accrued prior to January 1, 2006, at the employee's rate of pay at the time of retirement;

(b) receives continuing medical and life insurance benefits until the earlier of:

(i) the date the employee reaches the age eligible for Medicare; or ~~[for up to five years, which ever occurs sooner, and]~~

(ii) up to the following number of years:

(A) five years if the employee retires during calendar year 2006;

(B) four years if the employee retires during calendar year 2007;

(C) three years if the employee retires during calendar year 2008;

(D) two years if the employee retires during calendar year 2009;

(E) one year if the employee retires during calendar year 2010; or

(F) zero years if the employee retires after calendar year 2010; and

(c) may purchase additional continuing medical and life insurance benefits in accordance with Subsection (4).

(3) (a) ~~[An employee may have monies from the pay out]~~ Subject to federal requirements and limitations, the contribution under Subsection (2)(a) shall be transferred directly to the ~~[deferred compensation]~~ employee's defined contribution plan qualified under Section 401(k) of the Internal Revenue Code which is sponsored by the Utah State Retirement Board.

(b) If the amount calculated under Subsection (2)(a) exceeds the federal contribution limitations, the employee's unused accumulated sick leave hours representing the excess shall be used for the purchase of continuing medical and life insurance benefits under Subsection (4).

(4) (a) An employee may purchase continuing medical and life insurance benefits, at the rate of one month's coverage per policy for eight hours of unused sick leave remaining after:

(i) the ~~[pay-out]~~ contribution of unused sick leave under Subsection (2)(a); and

(ii) an additional reduction ~~[of 480 hours]~~, at the time of retirement, of unused sick leave~~[-]~~ hours as follows:

(A) 480 hours if the employee retires during calendar year 2006;

(B) 384 hours if the employee retires during calendar year 2007;

(C) 288 hours if the employee retires during calendar year 2008;

(D) 192 hours if the employee retires during calendar year 2009;

(E) 96 hours if the employee retires during calendar year 2010; or

(F) 0 hours if the employee retires after calendar year 2010.

(b) The medical coverage level for member, two person, or family coverage that is provided to the member at the time of retirement is the maximum coverage level available to the member under this program.

(c) The purchase of continuing medical and life insurance benefits at the rate provided under Subsection (4)(a) may be used by the employee to extend coverage:

(i) ~~beyond the [five]~~ number of years provided under Subsection (2) until the employee reaches the age of eligibility for Medicare; or

(ii) if the employee has reached the age of eligibility for Medicare, continuing medical benefits for the employee's spouse may be purchased until the employee's spouse reaches the age of eligibility for Medicare.

(d) An employee and the employee's spouse who are or who later become eligible for Medicare may purchase Medicare supplemental insurance at the rate of one month's coverage for eight hours of the employee's unused sick leave per person.

Section 4. Section **67-19-14.3** is amended to read:

**67-19-14.3. Continuation of Medical and Dental Insurance Benefits Program --  
Creation -- Coverage following death in the line of duty.**

(1) There is created the "Continuation of Medical and Dental Insurance Benefits Program" to provide a continuation of medical and dental insurance to the surviving spouse and family of any state employee whose death occurs in the line of duty.

(2) The insurance coverage shall continue for a period of five years or until the surviving spouse becomes eligible for Medicare, whichever occurs first.

(3) The program provides that unused accumulated sick leave of a deceased employee may be used for additional medical coverage in the same manner as provided under Section 67-19-14.2 or 67-19-14.4 as applicable.



Section 5. Section 67-19-14.4 is enacted to read:

67-19-14.4. Unused Sick Leave Retirement Program II -- Creation -- Remuneration at retirement -- Medical expense account after retirement.

(1) (a) There is created the "Unused Sick Leave Retirement Program II."

(b) An agency shall offer the Unused Sick Leave Retirement Option Program II to an employee who is eligible to receive retirement benefits in accordance with Title 49, Utah State Retirement and Insurance Benefit Act.

(c) Beginning January 1, 2011, an employee who is participating in the Unused Sick Leave Retirement Program I under Section 67-19-14.2 may make a one-time and irrevocable election to transfer all unused sick leave hours which shall include all converted sick leave hours under Section 67-19-14.1 for use under the Unused Sick Leave Retirement Program II under this section.

(2) (a) The Unused Sick Leave Retirement Program II provides that upon retirement an employee who is employed by the state on or after January 1, 2006, shall receive remuneration for the employee's unused accumulated sick leave and converted sick leave accrued beginning January 1, 2006 in accordance with this section as follows:

(i) subject to federal requirements and limitations, a contribution at the employee's rate of pay at the time of retirement for 25% of the employee's unused accumulated sick leave and converted sick leave shall be transferred directly to the employee's defined contribution plan qualified under Section 401(k) of the Internal Revenue Code which is sponsored by the Utah State Retirement Board; and

(ii) participation in a benefit plan that provides for reimbursement for medical expenses using monies deposited at the employee's rate of pay at the time of retirement from remaining unused accumulated sick leave and converted sick leave balances.

(b) If the amount calculated under Subsection (2)(a)(i) exceeds the federal contribution limitations, the amount representing the excess shall be deposited under Subsection (2)(a)(ii).

(c) An employee's rate of pay at the time of retirement for purposes of Subsection (2)(a)(ii) may not be less than the average rate of pay of state employees who retired in the same

retirement system under Title 49, Utah State Retirement and Insurance Benefit Act, during the previous calendar year.

(3) The Utah State Retirement Office shall develop and maintain a program to provide a benefit plan that provides for reimbursement for medical expenses under Subsection (2)(a)(ii) with:

(a) monies deposited under Subsection (2)(a)(ii); and

(b) accrued earnings.

Section 6. Effective date.

This bill takes effect on January 1, 2006.

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**Fiscal Note****Unused Sick Leave at Retirement Amendments**

04-Feb-05

**Bill Number HB0213**11:51 AM

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**AMENDED NOTE****State Impact**

Passage of this bill will phase out a current employee benefit which allows accumulated sick leave to be converted to paid-up health coverage at the time of retirement. It is anticipated that in the short term, the discontinuance of this benefit may result in earlier retirements which will increase the projected amount to be withdrawn from the state termination pools. This will necessitate an increase in the labor additive rate charged to all state agencies to cover these types of pay outs. However, it is noted that replacing earlier retirees with lower salaried people could result in a savings to the state. Because it is unknown how many employees will elect to retire earlier, an accurate estimate of these costs or savings is not available. There may also be a short term acceleration in the use of sick leave. In addition, the Utah State Retirement System will expend \$200,000, of which \$50,000 would be on-going to establish and maintain the new programs. Because this program is exclusively for tracking state employees and would not impact other entities within the Utah Retirement System, a General Fund appropriation to cover these costs would be required.

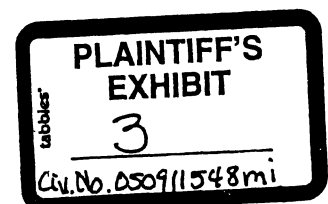
In the long term, it is anticipated that passage of this will result in significantly lower personnel costs to the state. Absent an actuarial study, no reliable estimate of this savings is available. However, as an example, eight hours of sick leave is worth \$160 based on \$20 per hour. If the state were paying \$760 per month for double coverage health insurance, a savings of \$600 would be realized for each similar circumstance. The Division of Finance pays out approximately \$15,000,000 annually from all funding sources for this benefit.

	<u>FY 2006</u>	<u>FY 2007</u>	<u>FY 2006</u>	<u>FY 2007</u>
	<u>Approp.</u>	<u>Approp.</u>	<u>Revenue</u>	<u>Revenue</u>
General Fund	\$200,000	\$50,000	\$0	\$0
<b>TOTAL</b>	<u>\$200,000</u>	<u>\$50,000</u>	<u>\$0</u>	<u>\$0</u>

**Individual and Business Impact**

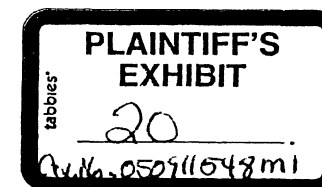
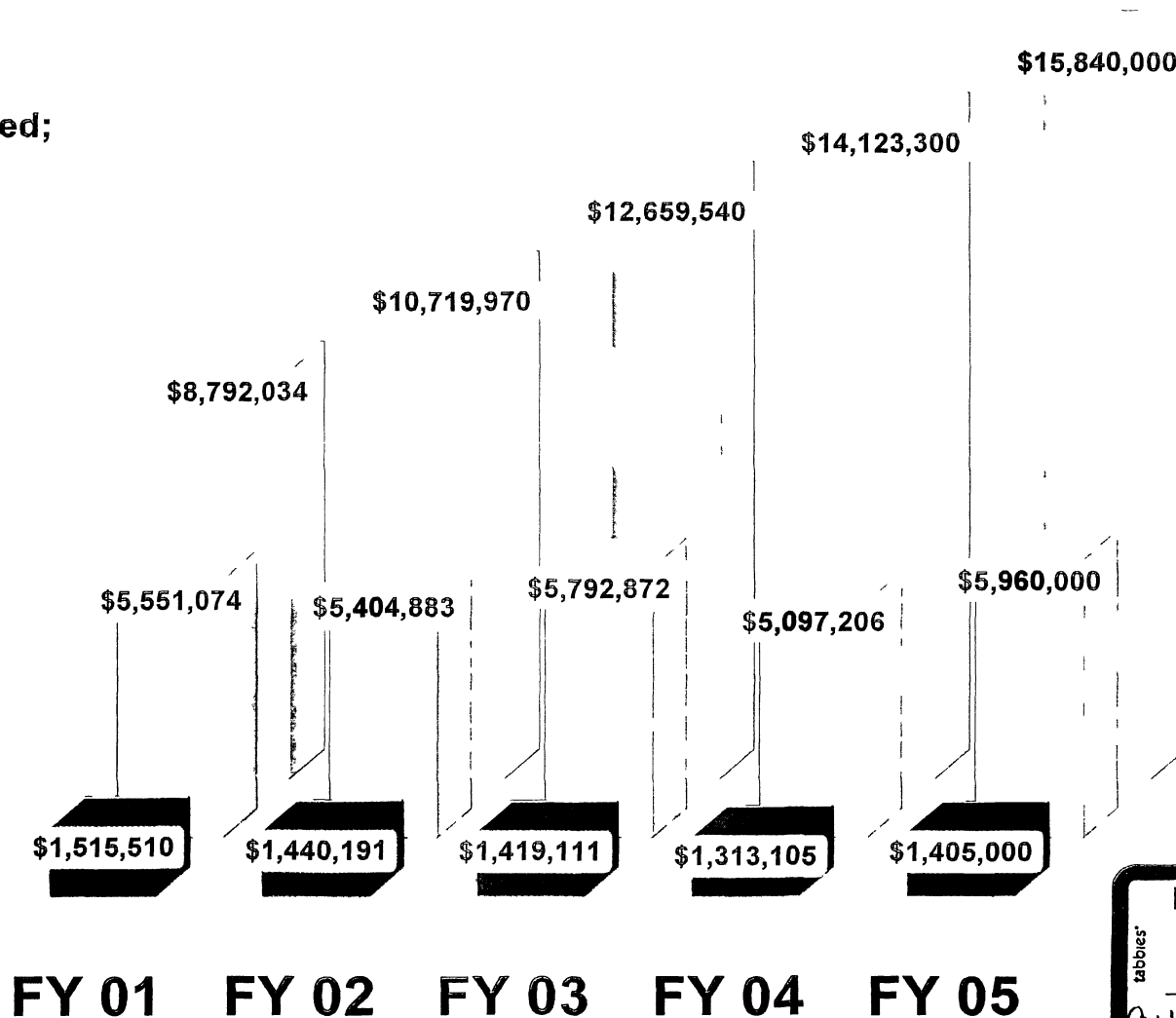
Current employees who have not used their sick leave in anticipation of using it to purchase health insurance upon retirement would experience a decrease in the value of those hours and would not be able to purchase coverage for as long as they otherwise would be eligible for.

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**Office of the Legislative Fiscal Analyst**

# Termination Pool – Paid Benefits

\*FY 05 is estimated;  
pools include:  
General,  
Public Safety,  
Education, and  
Transportation



Health Insurance

Annual Leave

25% Sick Leave

Prepared by the Office of Legislative Research and General Counsel, February 2005 Source: Division of Finance, 31-Jan-05

	CURRENT PROGRAM Apr. 1, 2006	HB213 Apr. 1, 2006	CURRENT PROGRAM Jan. 2, 2006	HB213 <sup>1</sup> Jan. 2, 2006
ACCUMULATED SICK LEAVE BALANCE <sup>2</sup>	1900	1900	1900	1900
25% MANDATORY 401(K) CONTRIBUTION OF UNUSED SICK LEAVE		475		475
PORTION OF 25% NOT CONTRIBUTED TO 401(K) DUE TO IRS LIMITATIONS		0		475
SUBTOTAL	1900	1425	1900	1900
AUTOMATIC DEDUCTION	480	480	480	480
SUBTOTAL	1420	945	1420	1420
PURCHASE ADDITIONAL INSURANCE (8 hrs = 1 month)	178	118	178	178
STATE-PAID INSURANCE BENEFIT RECEIVED (in months)	33	33	36	36
TOTAL MONTHS OF INSURANCE	211	151	214	214
TOTAL 25% MANDATORY 401(K) CONTRIBUTION FROM SICK LEAVE <sup>3</sup>		\$14,107.50		\$0.00
POTENTIAL TAX LIABILITY FOR CONSTRUCTIVE RECEIPT <sup>4</sup>	(\$3,904.96)		(\$3,904.96)	

TOTAL MONTHS OF ADDITIONAL INSURANCE FROM SICK LEAVE	178	118	178	178
ADDITIONAL BENEFIT / (HARM)	(\$3,904.96)	\$14,107.50	(\$3,904.96)	\$0.00

<sup>1</sup> Aggregate employer and employee contributions to a 401(k) plan for any given plan year may not exceed the employee's total compensation from the sponsoring employer for that year. This example assumes that the retiree will act to eliminate the shifting of all Program I hours to the State's 401(k) plan by: (1) retiring at the beginning of the plan year (i.e., January 2nd); and (2) maximizing his or her voluntary contributions (including contributions out of salary and accrued vacation) for the year of retirement. This example further assumes a sufficient level of employer nonelective contributions, including contributions from Program II hours, to fully offset the minimal amount of any remaining uncontributed compensation for the year.

<sup>2</sup> These are Program I hours the employee represents have been accumulated. See Roe Plaintiff's affidavit.

00340

<sup>3</sup> Calculated by multiplying employee's hourly rate (\$29.70) by 25% of the employee's unused Program I sick leave hours (475).

<sup>4</sup> The federal income tax rate will vary based on the individual employee's tax returns during any given year. This scenario assumes a

	CURRENT PROGRAM Apr. 1, 2008	HB213 Apr. 1, 2008	CURRENT PROGRAM Jan. 2, 2008	HB 213 <sup>1</sup> Jan. 2, 2008
Employee Turns Age 65 in December 2008				
ACCUMULATED SICK LEAVE BALANCE <sup>2</sup>	1900	1900	1900	1900
25% MANDATORY 401(K) CONTRIBUTION OF UNUSED SICK LEAVE		475		475
PORTION OF 25% NOT CONTRIBUTED TO 401(K) DUE TO IRS LIMITATIONS		0		475
SUBTOTAL	1900	1425	1900	1900
AUTOMATIC DEDUCTION	480	288	480	288
SUBTOTAL	1420	1137	1420	1612
PURCHASE ADDITIONAL INSURANCE (8 hrs = 1 month)	178	142	178	202
STATE-PAID INSURANCE BENEFIT RECEIVED (in months)	9	9	12	12
TOTAL MONTHS OF INSURANCE	187	151	190	214
TOTAL 25% MANDATORY 401(K) CONTRIBUTION FROM SICK LEAVE <sup>3</sup>		\$14,107.50		\$0.00
POTENTIAL TAX LIABILITY FOR CONSTRUCTIVE RECEIPT <sup>4</sup>	(\$3,904.96)		(\$3,904.96)	

TOTAL MONTHS OF ADDITIONAL INSURANCE FROM SICK LEAVE	178	142	178	202
ADDITIONAL BENEFIT / (HARM)	(\$3,904.96)	\$14,107.50	(\$3,904.96)	\$0.00

Aggregate employer and employee contributions to a 401(k) plan for any given plan year may not exceed the employee's total compensation from the sponsoring employer for that year. This example assumes that the retiree will act to eliminate the shifting of all Program I hours to the State's 401(k) plan by: (1) retiring at the beginning of the plan year (i.e., January 2nd); and (2) maximizing his or her voluntary contributions (including contributions out of salary and accrued vacation) for the year of retirement. This example further assumes a sufficient level of employer nonelective contributions, including contributions from Program II hours, to fully offset the minimal amount of any remaining uncontributed compensation for the year.

These are Program I hours the employee represents have been accumulated. See Roe Plaintiff's affidavit.

00341

Calculated by multiplying employee's hourly rate (\$29.70) by 25% of the employee's unused Program I sick leave hours (475).

The federal income tax rate will vary based on the individual employee's tax returns during any given year. This scenario assumes a federal income tax rate of 13.03%, in addition to the standard 7.65% FICA rate and 7.00% state tax rate. Therefore, the total taxable rate

	CURRENT PROGRAM Apr. 1, 2011	HB213 Apr. 1, 2011	CURRENT PROGRAM Jan. 2, 2011	HB 213 <sup>1</sup> Jan. 2, 2011
	Automatic 480 Hour Deduction / State-Paid Insurance Benefit Phased Out			
ACCUMULATED SICK LEAVE BALANCE <sup>2</sup>	1900	1900	1900	1900
25% MANDATORY 401(K) CONTRIBUTION OF UNUSED SICK LEAVE		475		475
PORTION OF 25% NOT CONTRIBUTED TO 401(K) DUE TO IRS LIMITATIONS		0		475
SUBTOTAL	1900	1425	1900	1900
AUTOMATIC DEDUCTION	480		480	
SUBTOTAL	1420	1425	1420	1900
PURCHASE ADDITIONAL INSURANCE (8 hrs = 1 month)	178	178	178	238
STATE-PAID INSURANCE BENEFIT RECEIVED (in months)	0		0	
TOTAL MONTHS OF INSURANCE	178	178	178	238
TOTAL 25% MANDATORY 401(K) CONTRIBUTION FROM SICK LEAVE <sup>3</sup>		\$14,107.50		\$0.00
POTENTIAL TAX LIABILITY FOR CONSTRUCTIVE RECEIPT <sup>4</sup>	(\$3,904.96)		(\$3,904.96)	

TOTAL MONTHS OF ADDITIONAL INSURANCE FROM SICK LEAVE	178	178	178	238
ADDITIONAL BENEFIT / (HARM)	(\$3,904.96)	\$14,107.50	(\$3,904.96)	\$0.00

<sup>1</sup> Aggregate employer and employee contributions to a 401(k) plan for any given plan year may not exceed the employee's total compensation from the sponsoring employer for that year. This example assumes that the retiree will act to eliminate the shifting of all Program I hours to the State's 401(k) plan by: (1) retiring at the beginning of the plan year (i.e., January 2nd); and (2) maximizing his or her voluntary contributions (including contributions out of salary and accrued vacation) for the year of retirement. This example further assumes a sufficient level of employer nonelective contributions, including contributions from Program II hours, to fully offset the minimal amount of any remaining uncontributed compensation for the year.

<sup>2</sup> These are Program I hours the employee represents have been accumulated. See Roe Plaintiff's affidavit.

00342

<sup>3</sup> Calculated by multiplying employee's hourly rate (\$29.70) by 25% of the employee's unused Program I sick leave hours (475).

<sup>4</sup> The federal income tax rate will vary based on the individual employee's tax returns during any given year. This scenario assumes a

	CURRENT PROGRAM May 1, 2007	HB213 May 1, 2007	CURRENT PROGRAM Jan. 2, 2007	HB213 <sup>1</sup> Jan. 2, 2007
	Employee Age 60		Employee Age 59	
ACCUMULATED SICK LEAVE BALANCE <sup>2</sup>	2300	2300	2300	2300
25% MANDATORY 401(K) CONTRIBUTION OF UNUSED SICK LEAVE		575		575
PORTION OF 25% NOT CONTRIBUTED TO 401(K) DUE TO IRS LIMITATIONS		0		575
SUBTOTAL	2300	1725	2300	2300
AUTOMATIC DEDUCTION	480	384	480	384
SUBTOTAL	1820	1341	1820	1916
PURCHASE ADDITIONAL INSURANCE (8 hrs = 1 month)	228	168	228	240
STATE-PAID INSURANCE BENEFIT RECEIVED (in months)	60	48	60	48
TOTAL MONTHS OF INSURANCE	288	216	288	288
TOTAL 401(K) CONTRIBUTION FROM SICK LEAVE <sup>3</sup>		\$14,909.75		\$0.00
POTENTIAL TAX LIABILITY FROM CONSTRUCTIVE RECEIPT <sup>4</sup>	(\$4,127.02)		(\$4,127.02)	

TOTAL MONTHS OF ADDITIONAL INSURANCE FROM SICK LEAVE	228	168	228	240
ADDITIONAL BENEFIT / (HARM)	(\$4,127.02)	\$14,909.75	(\$4,127.02)	\$0.00

Aggregate employer and employee contributions to a 401(k) plan for any given plan year may not exceed the employee's total compensation from the sponsoring employer for that year. This example assumes that the retiree will act to eliminate the shifting of all program I hours to the State's 401(k) plan by: (1) retiring at the beginning of the plan year (i.e., January 2nd); and (2) maximizing his or her voluntary contributions (including contributions out of salary and accrued vacation) for the year of retirement. This example further assumes a sufficient level of employer nonelective contributions, including contributions from Program II hours, to fully offset the minimal amount of any remaining uncontributed compensation for the year.

These are Program I hours the employee represents have been accumulated. See Roe Plaintiff's affidavit.

00343

<sup>2</sup> Calculated by multiplying employee's hourly rate (\$25.93) by 25% of the employee's unused Program I sick leave hours (575).

<sup>4</sup> The federal income tax rate will vary based on the individual employee's tax returns during any given year. This scenario assumes a federal income tax rate of 13.03%, in addition to the standard 7.65% FICA rate and 7.00% state tax rate. Therefore, the total taxable



**ROE PLAINTIFF #2 - ROBERT H. ANDERSON**

	CURRENT PROGRAM May 1, 2008	HB213 May 1, 2008	CURRENT PROGRAM Jan. 2, 2008	HB213 <sup>1</sup> Jan. 2, 2008
	Employee Age 61		Employee Age 60	
ACCUMULATED SICK LEAVE BALANCE <sup>2</sup>	2300	2300	2300	2300
25% MANDATORY 401(K) CONTRIBUTION OF UNUSED SICK LEAVE		575		575
PORTION OF 25% NOT CONTRIBUTED TO 401(K) DUE TO IRS LIMITATIONS		0		575
SUBTOTAL	2300	1725	2300	2300
AUTOMATIC DEDUCTION	480	288	480	288
SUBTOTAL	1820	1437	1820	2012
PURCHASE ADDITIONAL INSURANCE (8 hrs = 1 month)	228	180	228	252
STATE-PAID INSURANCE BENEFIT RECEIVED (in months)	48	36	52	36
TOTAL MONTHS OF INSURANCE	276	216	280	288
TOTAL 401(K) CONTRIBUTION FROM SICK LEAVE <sup>3</sup>		\$14,909.75		\$0.00
POTENTIAL TAX LIABILITY FROM CONSTRUCTIVE RECEIPT <sup>4</sup>	(\$4,127.02)		(\$4,127.02)	

TOTAL MONTHS OF ADDITIONAL INSURANCE FROM SICK LEAVE	228	180	228	252
ADDITIONAL BENEFIT / (HARM)	(\$4,127.02)	\$14,909.75	(\$4,127.02)	\$0.00

<sup>1</sup> Aggregate employer and employee contributions to a 401(k) plan for any given plan year may not exceed the employee's total compensation from the sponsoring employer for that year. This example assumes that the retiree will act to eliminate the shifting of all Program I hours to the State's 401(k) plan by: (1) retiring at the beginning of the plan year (i.e., January 2nd); and (2) maximizing his or her voluntary contributions (including contributions out of salary and accrued vacation) for the year of retirement. This example further assumes a sufficient level of employer nonelective contributions, including contributions from Program II hours, to fully offset the minimal amount of any remaining uncontributed compensation for the year.

<sup>2</sup> These are Program I hours the employee represents have been accumulated. See Roe Plaintiff's affidavit.

00344

<sup>3</sup> Calculated by multiplying employee's hourly rate (\$25.93) by 25% of the employee's unused Program I sick leave hours (575).

	CURRENT PROGRAM May 1, 2011	HB213 May 1, 2011	CURRENT PROGRAM Jan. 2, 2011	HB213 <sup>1</sup> Jan 2, 2011
	Automatic 480 Hour Deduction/State-Paid Insurance Benefit Phased Out			
	Employee Age 64		Employee Age 63	
ACCUMULATED SICK LEAVE BALANCE <sup>2</sup>	2300	2300	2300	2300
25% MANDATORY 401(K) CONTRIBUTION OF UNUSED SICK LEAVE		575		575
PORTION OF 25% NOT CONTRIBUTED TO 401(K) DUE TO IRS LIMITATIONS		0		575
SUBTOTAL	2300	1725	2300	2300
AUTOMATIC DEDUCTION	480		480	
SUBTOTAL	1820	1725	1820	2300
PURCHASE ADDITIONAL INSURANCE (8 hrs = 1 month)	228	216	228	288
STATE-PAID INSURANCE BENEFIT RECEIVED (in months)	12		16	
TOTAL MONTHS OF INSURANCE	240	216	244	288
TOTAL 401(K) CONTRIBUTION FROM SICK LEAVE <sup>3</sup>		\$14,909.75		\$0.00
POTENTIAL TAX LIABILITY FROM CONSTRUCTIVE RECEIPT <sup>4</sup>	(\$4,127.02)		(\$4,127.02)	

TOTAL MONTHS OF ADDITIONAL INSURANCE FROM SICK LEAVE	228	216	228	288
ADDITIONAL BENEFIT / (HARM)	(\$4,127.02)	\$14,909.75	(\$4,127.02)	\$0.00

Aggregate employer and employee contributions to a 401(k) plan for any given plan year may not exceed the employee's total compensation from the sponsoring employer for that year. This example assumes that the retiree will act to eliminate the shifting of all Program I hours to the State's 401(k) plan by: (1) retiring at the beginning of the plan year (i.e., January 2nd); and (2) maximizing his or her voluntary contributions (including contributions out of salary and accrued vacation) for the year of retirement. This example further assumes a sufficient level of employer nonelective contributions, including contributions from Program II hours, to fully offset the minimal amount of any remaining uncontributed compensation for the year.

These are Program I hours the employee represents have been accumulated. See Roe Plaintiff's affidavit.

00345

Calculated by multiplying employee's hourly rate (\$25.93) by 25% of the employee's unused Program I sick leave hours (575).

The federal income tax rate will vary based on the individual employee's tax returns during any given year. This scenario assumes a

**ROE PLAINTIFF #2 - ROBERT H. ANDERSON**

	CURRENT PROGRAM May 1, 2012	HB213 May 1, 2012	CURRENT PROGRAM Jan. 2, 2012	HB213 <sup>1</sup> Jan 2, 2012
	Automatic 480 Hour Deduction/State-Paid Insurance Benefit Phased Out			
	Employee Age 65		Employee Age 64	
ACCUMULATED SICK LEAVE BALANCE <sup>2</sup>	2300	2300	2300	2300
25% MANDATORY 401(K) CONTRIBUTION OF UNUSED SICK LEAVE		575		575
PORTION OF 25% NOT CONTRIBUTED TO 401(K) DUE TO IRS LIMITATIONS		0		575
SUBTOTAL	2300	1725	2300	2300
AUTOMATIC DEDUCTION	480		480	
SUBTOTAL	1820	1725	1820	2300
PURCHASE ADDITIONAL INSURANCE (8 hrs = 1 month)	228	216	228	288
STATE-PAID INSURANCE BENEFIT RECEIVED (in months)	0		4	
TOTAL MONTHS OF INSURANCE	228	216	232	288
TOTAL 401(K) CONTRIBUTION FROM SICK LEAVE <sup>3</sup>		\$14,909.75		\$0.00
POTENTIAL TAX LIABILITY FROM CONSTRUCTIVE RECEIPT <sup>4</sup>	(\$4,127.02)		(\$4,127.02)	

TOTAL MONTHS OF ADDITIONAL INSURANCE FROM SICK LEAVE	228	216	228	288
ADDITIONAL BENEFIT / (HARM)	(\$4,127.02)	\$14,909.75	(\$4,127.02)	\$0.00

<sup>1</sup> Aggregate employer and employee contributions to a 401(k) plan for any given plan year may not exceed the employee's total compensation from the sponsoring employer for that year. This example assumes that the retiree will act to eliminate the shifting of all Program I hours to the State's 401(k) plan by: (1) retiring at the beginning of the plan year (i.e., January 2nd); and (2) maximizing his or her voluntary contributions (including contributions out of salary and accrued vacation) for the year of retirement. This example further assumes a sufficient level of employer nonelective contributions, including contributions from Program II hours, to fully offset the minimal amount of any remaining uncontributed compensation for the year.

<sup>2</sup> These are Program I hours the employee represents have been accumulated. See Roe Plaintiff's affidavit.

00346

<sup>3</sup> Calculated by multiplying employee's hourly rate (\$25.93) by 25% of the employee's unused Program I sick leave hours (575).

	CURRENT PROGRAM Apr. 1, 2014	HB213 Apr. 1, 2014	CURRENT PROGRAM Jan. 2, 2014	HB213 <sup>1</sup> Jan. 2, 2014
	Automatic 480 Hour Deduction/State-Paid Insurance Benefit Phased Out Employee Age 60			
ACCUMULATED SICK LEAVE BALANCE <sup>2</sup>	1600	1600	1600	1600
25% MANDATORY 401(K) CONTRIBUTION OF UNUSED SICK LEAVE		400		400
PORTION OF 25% NOT CONTRIBUTED TO 401(K) DUE TO IRS LIMITATIONS		0		400
UBTOTAL	1600	1200	1600	1600
AUTOMATIC DEDUCTION	480		480	
UBTOTAL	1120	1200	1120	1600
PURCHASE ADDITIONAL INSURANCE (hrs = 1 month)	140	150	140	200
STATE-PAID INSURANCE BENEFIT RECEIVED (1 months)	60		60	
TOTAL MONTHS OF INSURANCE	200	150	200	200
TOTAL 401(K) CONTRIBUTION FROM SICK LEAVE <sup>3</sup>		\$8,000.00		\$0.00
POTENTIAL TAX LIABILITY FOR CONSTRUCTIVE RECEIPT <sup>4</sup>	(\$2,214.40)		(\$2,214.40)	

TOTAL MONTHS OF ADDITIONAL INSURANCE FROM SICK LEAVE	140	150	140	200
ADDITIONAL BENEFIT / (HARM)	(\$2,214.40)	\$8,000.00	(\$2,214.40)	\$0.00

Aggregate employer and employee contributions to a 401(k) plan for any given plan year may not exceed the employee's total compensation from the sponsoring employer for that year. This example assumes that the retiree will act to eliminate the shifting of all program I hours to the State's 401(k) plan by: (1) retiring at the beginning of the plan year (i.e., January 2nd); and (2) maximizing his or her voluntary contributions (including contributions out of salary and accrued vacation) for the year of retirement. This example further assumes a sufficient level of employer nonelective contributions, including contributions from Program II hours, to fully offset the minimal amount of any remaining uncontributed compensation for the year.

These are Program I hours the employee represents have been accumulated. See Roe Plaintiff's affidavit.

00347

Calculated by multiplying employee's hourly rate (assumed \$20.00) by 25% of the unused Program I sick leave hours (400).

The federal income tax rate will vary based on the individual employee's tax returns during any given year. This scenario assumes a marginal income tax rate of 13.03%, in addition to the standard 7.65% FICA rate and 7.00% state tax rate. Therefore, the total taxable rate assumed is 27.68%.

	CURRENT PROGRAM Apr. 1, 2019	HB213 Apr. 1, 2019	CURRENT PROGRAM Jan. 2, 2019	HB213 <sup>1</sup> Jan. 2, 2019
Automatic 480 Hour Deduction/State-Paid Insurance Benefit Phased Out Employee Age 65				
ACCUMULATED SICK LEAVE BALANCE <sup>2</sup>	1600	1600	1600	1600
25% MANDATORY 401(K) CONTRIBUTION OF UNUSED SICK LEAVE		400		400
PORTION OF 25% NOT CONTRIBUTED INTO 401(K) DUE TO IRS LIMITATIONS		0		0
SUBTOTAL	1600	1200	1600	1200
AUTOMATIC DEDUCTION	480		480	
SUBTOTAL	1120	1200	1120	1200
PURCHASE ADDITIONAL INSURANCE (8 hrs = 1 month)	140	150	140	150
STATE-PAID INSURANCE BENEFIT RECEIVED (in months)	0		0	
TOTAL MONTHS OF INSURANCE	140	150	140	150
TOTAL 401(K) CONTRIBUTION FROM SICK LEAVE <sup>3</sup>		\$8,000.00		\$0.00
POTENTIAL TAX LIABILITY FOR CONSTRUCTIVE RECEIPT <sup>4</sup>	(\$2,214.40)		(\$2,214.40)	

TOTAL MONTHS OF ADDITIONAL INSURANCE FROM SICK LEAVE	140	150	140	150
ADDITIONAL BENEFIT / (HARM)	(\$2,214.40)	\$8,000.00	(\$2,214.40)	\$0.00

Aggregate employer and employee contributions to a 401(k) plan for any given plan year may not exceed the employee's total compensation from the sponsoring employer for that year. This example assumes that the retiree will act to eliminate the shifting of all program I hours to the State's 401(k) plan by: (1) retiring at the beginning of the plan year (i.e., January 2nd); and (2) maximizing his or her voluntary contributions (including contributions out of salary and accrued vacation) for the year of retirement. This example further assumes a sufficient level of employer nonelective contributions, including contributions from Program II hours, to fully offset the minimal amount of any remaining uncontributed compensation for the year.

These are Program I hours the employee represents have been accumulated. See Roe Plaintiff's affidavit.

00348

Calculated by multiplying employee's hourly rate (assumed \$20.00) by 25% of the unused Program I sick leave hours (400).

The federal income tax rate will vary based on the individual employee's tax returns during any given year. This scenario assumes a federal income tax rate of 13.03%, in addition to the standard 7.65% FICA rate and 7.00% state tax rate. Therefore, the total taxable rate

IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

\* \* \*

**COPY**

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UTAH PUBLIC EMPLOYEES	)	
ASSOCIATION AND ROES 1 - 5,	)	
	)	
PLAINTIFFS,	)	CASE NO. 050911548
	)	
VS.	)	TRANSCRIPT OF:
	)	
STATE OF UTAH,	)	<u>JUDGE'S RULING</u>
	)	
DEFENDANT.	)	

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BEFORE THE HONORABLE WILLIAM W. BARRETT

SCOTT M. MATHESON COURTHOUSE  
450 SOUTH STATE STREET  
SALT LAKE CITY, UTAH 84114-1860

DECEMBER 8, 2005

REPORTED BY: EILEEN M. AMBROSE, CSR

A P P E A R A N C E S

FOR THE PLAINTIFF:

BENSON L. HATHAWAY, JR.  
STEPHEN W. GEARY  
KENNETH BIRRELL  
KIRTON & MC CONKIE  
60 EAST SOUTH TEMPLE, #1800  
P.O. BOX 45120  
SALT LAKE CITY, UTAH 84145

FOR THE DEFENDANT:

CLARK WADDOUPS  
HEIDI E.C. LEITHEAD  
CHEYLYNN HAYMAN  
PARR, WADDOUPS, BROWN, GEE & LOVELESS  
185 SOUTH STATE STREET, SUITE #1300  
SALT LAKE CITY, UTAH 84111

ALSO PRESENT:

RAYMOND A. HINTZE  
ASSISTANT ATTORNEY GENERAL  
STATE CAPITOL COMPLEX, #E320  
SALT LAKE CITY, UTAH 84114

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P R O C E E D I N G S

THE COURT: GOOD MORNING, EVERYBODY. THIS IS THE  
CASE OF UTAH PUBLIC EMPLOYEES ASSOCIATION AND ROES 1 THROUGH 5,  
VERSUS STATE OF UTAH, CIVIL NO. 050911548.

MAY I HAVE EVERYONE'S APPEARANCES, PLEASE?

MR. HATHAWAY: YES, YOUR HONOR. BEN HATHAWAY AND  
STEVE GEARY AND KENNETH BIRRELL FOR THE PLAINTIFFS.

MR. WADDOUPS: CLARK WADDOUPS, HEIDI LEITHEAD AND  
CHEYLYNN HAYMAN HERE FOR THE STATE. RAY HINTZE FROM THE  
ATTORNEY GENERALS OFFICE IS ALSO SEATED BEHIND US.

THE COURT: THANK YOU. WELL, I'D LIKE TO MAKE A FEW  
PRELIMINARY COMMENTS ABOUT THIS CASE BEFORE I GET INTO MY  
ACTUAL RULING. AND I WANT TO SAY TO ALL OF THE STATE EMPLOYEES  
THAT I DO RECOGNIZE THAT H.B. 213 MAY AFFECT ALL STATE, OR WILL  
AFFECT ALL STATE EMPLOYEES IN ALL KINDS OF DIFFERENT WAYS, AND  
MAY VERY WELL CREATE A HARDSHIP FOR SOME OF 'EM. AND I AM  
SYMPATHETIC WITH THOSE WHO HAVE THE TIME INVESTED WITH THE  
STATE WHO ARE IMPACTED THE MOST.

AS AN EXAMPLE, AND I'VE DISCLOSED THIS WHEN I FIRST  
HAD THE PARTIES HERE BEFORE ME, BUT I HAD A LEAD CLERK, WHO'S  
MOVED ON NOW, NOT RETIRED, BUT MOVED ON TO ANOTHER JOB, WHO  
WORKED WITH ME FOR ABOUT TEN YEARS. AND SHE HAS A SIGNIFICANT  
AMOUNT OF SICK LEAVE ACCUMULATED, AND SHE HAS BEEN WITH THE  
STATE FOR ABOUT 24 YEARS. ALMOST 25, BUT NOT QUITE. AND WHEN  
I LOOK AT HER AND THE IMPACT H.B. 213 MAY HAVE, BASED UPON THE



1 TESTIMONY I'VE HEARD DURING THE HEARINGS THAT WE'VE HAD, I'M  
2 VERY SYMPATHETIC, AND I FEEL BAD, BUT I CAN'T LET THAT  
3 DETERMINE HOW I'M GOING TO RULE ON THIS CASE.

4 I NEED TO ALSO ADVISE THE PARTIES THAT I'VE RECEIVED  
5 661 E-MAILS AS OF YESTERDAY FROM STATE EMPLOYEES. AND ALTHOUGH  
6 I WOULD HAVE LIKED TO HAVE READ EACH ONE OF THOSE E-MAILS I  
7 FELT IT WAS IMPROPER TO DO SO, AND THEREFORE I DIDN'T, AND THEY  
8 WERE FORWARDED ON TO ANOTHER INDIVIDUAL.

9 IN ADDITION, I REALIZE THAT THIS CASE IS VERY HIGHLY,  
10 EMOTIONALLY CHARGED. I'M TOLD THAT WE HAVE ABOUT 20 THOUSAND  
11 STATE EMPLOYEES. I HOPE I GOT THE NUMBER RIGHT. BUT, IN ANY  
12 EVENT, BECAUSE OF THAT EMOTION, WHAT I HAVE TO SAY NEXT MAY  
13 HAVE NO IMPACT ON THOSE PEOPLE THAT I WANT TO REACH.

14 IN ANY EVENT, WHEN I WAS SWORN IN AS A JUDGE I  
15 COMMITTED TO UPHOLD THE U.S. CONSTITUTION AND THE STATE  
16 CONSTITUTION AND TO FOLLOW THE RULE OF LAW. AND THE FACT THAT  
17 I AM SYMPATHETIC WITH THE IMPACT H.B. 213 MAY HAVE ON STATE  
18 EMPLOYEES I CERTAINLY CAN'T LET THAT BE A FACTOR WHICH GUIDES  
19 ME IN RULING ON THE ISSUES BEFORE ME TODAY.

20 NOW, TO GET ON TO THE MORE SERIOUS ASPECTS OF THIS  
21 CASE. THE PLAINTIFFS HAVE FILED A MOTION FOR A PRELIMINARY  
22 INJUNCTION, THE GRANTING OF THAT INJUNCTION, IN EFFECT WOULD,  
23 OR WOULD PRECLUDE H.B. 213 FROM BECOMING EFFECTIVE AS OF  
24 JANUARY 1, 2006. HOWEVER, IN ORDER TO PREVAIL ON THIS MOTION  
25 THE PLAINTIFFS ARE REQUIRED TO ESTABLISH THE FOLLOWING.

1           (1), THE PLAINTIFFS WILL SUFFER IRREPARABLE HARM  
2 UNLESS THE ORDER OR INJUNCTION ISSUES.

3           (2), THE THREATENED INJURY TO THE PLAINTIFFS  
4 OUTWEIGHS WHATEVER DAMAGE THE PROPOSED ORDER OR INJUNCTION MAY  
5 CAUSE THE PARTY RESTRAINED, AND THE PARTY IS THE STATE OF UTAH,  
6 WERE ENJOINED.

7           (3), THE ORDER OR INJUNCTION, IF ISSUED, WOULD NOT BE  
8 ADVERSE TO THE PUBLIC INTEREST.

9           AND LASTLY, THERE'S A SUBSTANTIAL LIKELIHOOD THAT THE  
10 PLAINTIFFS WILL PREVAIL ON THE MERITS OF THE UNDERLYING CLAIM,  
11 OR THE CASE PRESENTS SERIOUS ISSUES ON THE MERITS WHICH SHOULD  
12 BE THE SUBJECT OF FURTHER LITIGATION.

13           WE'VE HAD AN EVIDENTIARY HEARING, WE SPENT AT LEAST  
14 TWO FULL DAYS, AS I RECALL, TAKING EVIDENCE IN THIS CASE. AND  
15 THE PURPOSE FOR THAT WAS TO ADDRESS THE CRITERIA THAT THE  
16 PLAINTIFFS NEED TO PREVAIL ON IN ORDER FOR THE PRELIMINARY  
17 INJUNCTION TO ISSUE. HOWEVER, THE STATE OF UTAH HAS FILED A  
18 MOTION FOR JUDGMENT ON THE PLEADINGS, AND I THINK IT WOULD BE  
19 MORE APPROPRIATE FOR ME TO ADDRESS THOSE ISSUES FIRST.

20           NOW, CONTAINED IN THE PLAINTIFF'S AMENDED COMPLAINT  
21 ARE THREE CLAIMS, THE FIRST OF WHICH IS BREACH OF CONTRACT.  
22 GENERALLY, IN UTAH, PUBLIC EMPLOYEES' EMPLOYMENT RIGHTS ARE  
23 STATUTORY AND NOT CONTRACTUAL. THE PLAINTIFFS CLAIM THAT THERE  
24 ARE TWO EXCEPTIONS TO THIS. AND THOSE TWO EXCEPTIONS ARE, ONE,  
25 WHEN A PUBLIC EMPLOYEE HAS GAINED A VESTED CONTRACTUAL INTEREST

1 IN RETIREMENT, AND THE SECOND ONE IS WHEN THE GOVERNMENT  
2 VOLUNTARILY UNDERTAKES AN ADDITIONAL DUTY THAT IT WOULD  
3 OTHERWISE HAVE NO OBLIGATION TO PERFORM.

4 SO TAKING THOSE SEPARATELY, THE VESTED CONTRACTUAL  
5 INTEREST IN RETIREMENT, I THINK THERE ARE A COUPLE OF  
6 CONTROLLING CASES. THE FIRST CASE IS ELLIS V UTAH STATE  
7 RETIREMENT BOARD, WHERE THE COURT OF APPEALS MADE IT CLEAR THAT  
8 QUOTE "AN EMPLOYEE HAS A VESTED CONTRACTUAL RIGHT ONLY WHEN HE  
9 HAS SATISFIED ALL CONDITIONS PRECEDENT TO RECEIVING THE  
10 BENEFIT, I.E., HE HAS ATTAINED RETIREMENT AGE OR HAS BEEN  
11 MEDICALLY DISABLED," END QUOTE.

12 HANSEN V PUBLIC EMPLOYEES RETIREMENT SYSTEM, BOARD OF  
13 ADMINISTRATION, ALSO SUPPORTS THAT CONCLUSION.

14 ONE OF THE CONDITIONS OF VESTING IS THAT THE PERSON  
15 MUST ACTUALLY RETIRE. AND I THINK THIS IS SUPPORTED BY  
16 STATUTE, UTAH CODE ANNOTATED SECTION 67-19-14.2(1)(B)(2), AND  
17 ALSO THE UTAH ADMINISTRATIVE RULE 477-7-6. I DON'T THINK I  
18 NEED TO READ THOSE TO ANYONE. I THINK THE ATTORNEYS KNOW WHAT  
19 THAT RULE AND THAT STATUTORY SECTION PROVIDE.

20 SO THE CONCLUSION IS THAT UNTIL AN EMPLOYEE RETIRES  
21 THEY HAVE NO CONTRACT RIGHT WITH THE STATE OF UTAH FOR  
22 RETIREMENT BENEFITS, NOTHING IS VESTED.

23 THE NEXT CLAIM ASSERTED BY THE PLAINTIFFS IS THE --  
24 OH, THE NEXT EXCEPTION I'M SORRY, IS THE VOLUNTARY UNDERTAKING.  
25 NOW THE TERMS OF THE UNUSED SICK LEAVE PROGRAM ARE STATUTORY,

1 THEREFORE, THERE IS NO VOLUNTARY UNDERTAKING IN MY, FROM MY  
2 PERSPECTIVE. IT IS ARGUED THAT SINCE AGENCIES CAN OPT INTO THE  
3 PROGRAM AND OFFER IT TO EMPLOYEES IT THEN BECOMES A VOLUNTARY  
4 ACT. HOWEVER, THE TERMS OF THE PROGRAM CREATED BY STATUTE DO  
5 NOT CHANGE. THERE ARE NO ADDITIONAL OBLIGATIONS UNDERTAKEN  
6 BEYOND THE STATUTORY TERMS. THIS EXCEPTION DOES NOT APPLY,  
7 NOTHING IS VESTED, AND THERE IS NO CONTRACT.

8 THE NEXT CLAIM ASSERTED BY THE PLAINTIFFS IN THEIR  
9 AMENDED COMPLAINT IS A TAKING CLAIM. AND I WANT TO JUST  
10 COMMENT ON THIS A LITTLE BIT, BECAUSE A CHANGE THAT OCCURRED,  
11 AND I'LL DISCUSS THAT IN A MINUTE, BUT IF THE PLAINTIFFS ARE  
12 SEEKING MONETARY DAMAGES UNDER THE CLAIM, IT IS NOT RIPE AND  
13 SHOULD BE DISMISSED. AND THE REASON I SAY THAT IS BECAUSE IN  
14 THEIR AMENDED COMPLAINT THERE IS A PRAYER FOR MONETARY DAMAGES.  
15 AND IF THAT'S THE CASE, AND THEY INTEND TO PURSUE THAT IN SOME  
16 FASHION, IT'S NOT RIPE, IT WOULD BE DISMISSED.

17 SECONDLY, I BELIEVE U.P.E.A. LACKS ASSOCIATIONAL  
18 STANDING. THEY CAN'T REPRESENT ALL OF THE STATE EMPLOYEES FOR  
19 -- WHERE MONETARY DAMAGES ARE BEING SOUGHT.

20 HOWEVER, THE PLAINTIFFS NOW ASSERT THAT THIS CLAIM IS  
21 A FACIAL CHALLENGE TO H.B. 213. AND ON PAGE 4 OF PLAINTIFF'S  
22 REPLY MEMORANDUM THEY SAY QUOTE "PLAINTIFFS DO NOT SEEK DAMAGES  
23 FOR THE SPECIFIC IMPACT OF H.B. 213 UPON EACH INDIVIDUAL,  
24 PLAINTIFFS SEEK TO ENJOIN THE BILL," CLOSE QUOTE.

25 THEN THEY GO ON TO SAY ON PAGE 5 OF THEIR REPLY

1 MEMORANDUM, THAT THE CHALLENGED PORTION OF H.B. 213 IS QUOTE  
2 "THAT WHICH PREVENTS EMPLOYEES FROM USING MORE THAN 75 PERCENT  
3 OF THEIR UNUSED SICK LEAVE FOR THE PURCHASE OF INSURANCE." SO  
4 NOW IT APPEARS THAT THEY ARE NARROWLY CHALLENGING ONLY ONE  
5 ASPECT OF THE BILL. BUT, IN ANY EVENT, IF, AS THE PLAINTIFFS  
6 NOW CLAIM, THEY ARE ONLY SEEKING INJUNCTIVE RELIEF, OBVIOUSLY,  
7 THE CLAIM IS RIPE, AND I NEED TO ADDRESS THE ISSUE.

8 PLAINTIFFS ARGUE THAT ANY SUBSTANTIAL INTERFERENCE  
9 WITH PRIVATE PROPERTY WHICH DESTROYS OR MATERIALLY LESSENS ITS  
10 VALUE, OR BY WHICH THE OWNER'S RIGHT TO USE AND ENJOYMENT, IS  
11 IN ANY SUBSTANTIAL DEGREE ABRIDGED OR DESTROYED AS A TAKING.  
12 AND THE CLAIMS THEY MAKE, THAT AMOUNT TO THE TAKING, IS THAT  
13 THE VALUE OF THEIR ACCUMULATED SICK LEAVE IS MATERIALLY  
14 LESSENE.

15 SECOND, THE LOSS, LOST THE RIGHT TO CHOOSE HOW TO USE  
16 THEIR SICK LEAVE.

17 AND THIRD, WHEN TO RETIRE IN ORDER TO MAXIMIZE  
18 BENEFITS.

19 AND THEN LASTLY, THE RIGHT TO RECEIVE CASH PAYMENTS.

20 HOWEVER, AS STATED EARLIER, PLAINTIFFS HAVE NO RIGHT  
21 TO CONVERT SICK LEAVE INTO A RETIREMENT BENEFIT UNTIL A PERSON  
22 ACTUALLY RETIRES. THE SAME HOLDS TRUE WITH THE RECEIPT OF CASH  
23 PAYMENTS. SO THERE ARE NO VESTED RIGHTS. AND IN ADDITION, THE  
24 CHOICE OF WHEN TO RETIRE IS STILL UP TO THE EMPLOYEE AND IS NOT  
25 A PROPERTY RIGHT.

1 THE STATE ALSO ARGUES THAT PLAINTIFFS CANNOT AND HAVE  
2 NOT MET THE CRITERIA NECESSARY TO MOUNT THE FACIAL CHALLENGE TO  
3 H.B. 213. AND I'M NOT GOING TO GO INTO THE ANALYSIS THAT THEY  
4 HAVE MADE, BUT I AGREE WITH WHAT THEY ARGUE. AND BASED UPON  
5 THAT MY CONCLUSION IS THERE'S NO UNCONSTITUTIONAL TAKING.

6 THE LAST CLAIM ASSERTED BY THE PLAINTIFFS IS THEIR  
7 ESTOPPEL CLAIM. AND THERE ARE FIVE ELEMENTS THAT THEY MUST BE  
8 ABLE TO ESTABLISH TO PREVAIL ON THIS CLAIM.

9 THOSE ELEMENTS ARE (1), AN ADMISSION, STATEMENT OR  
10 ACT INCONSISTENT WITH THE CLAIM AFTERWARDS ASSERTED.

11 (2), ACTION BY THE OTHER PARTY ON THE FAITH OF SUCH  
12 ADMISSION, STATEMENT OR ACT.

13 (3), INJURY TO SUCH OTHER PARTY RESULTING FROM  
14 ALLOWING THE FIRST PARTY TO CONTRADICT OR REPUDIATE SUCH  
15 ADMISSION, STATEMENT OR ACT.

16 (4), UNUSUAL CIRCUMSTANCES WHERE IT IS PLAINLY  
17 APPARENT THAT AN INJUSTICE WILL RESULT WITHOUT ESTOPPEL.

18 AND THE LAST IS NO SUBSTANTIALLY ADVERSE EFFECT ON  
19 PUBLIC POLICY.

20 THE FACTUAL ALLEGATIONS CONTAINED IN THE AMENDED  
21 COMPLAINT APPEAR TO SATISFY THE FIRST THREE ELEMENTS. HOWEVER,  
22 THE FOURTH ELEMENT REQUIRES THE PLAINTIFFS TO SHOW THAT  
23 H.B. 213 WORKS SUCH AN INJUSTICE THAT THE STATE SHOULD BE  
24 POWERLESS TO CHANGE ITS OWN LAWS. PLAINTIFFS CLAIMING A FACIAL  
25 CHALLENGE OF H.B. 213, THIS INJUSTICE MUST BE A NECESSARY

1 RESULT IN EVERY POSSIBLE APPLICATION OF H.B. 213. SINCE THE  
2 FACIAL CHALLENGE FAILS AS A MATTER OF LAW, THE PLAINTIFFS  
3 CANNOT SATISFY THE INJUSTICE REQUIREMENT.

4 IT IS CLEAR THROUGH THE EVIDENCE PRESENTED THAT SOME  
5 PUBLIC EMPLOYEES WILL BE ENTIRELY UNAFFECTED BY HOUSE 213, SOME  
6 MAY BE ADVERSELY IMPACTED, AND SOME MAY BE SIGNIFICANTLY  
7 BENEFITED. IT DOES NOT WORK A SUBSTANTIAL INJUSTICE TO EVERY  
8 STATE EMPLOYEE.

9 AS TO THE LAST ELEMENT THAT THERE'S NO ADVERSE EFFECT  
10 ON PUBLIC POLICY, IT IS CLEAR THROUGH THE EVIDENCE PRESENTED  
11 THAT THERE IS AN ADVERSE IMPACT. FOR EXAMPLE, PLAINTIFFS ARGUE  
12 THAT THE STATE HAS ALREADY PRICED THE COST OF EMPLOYEES UNUSED  
13 SICK LEAVE AT 240 MILLION FIVE-HUNDRED THIRTY-EIGHT THOUSAND  
14 DOLLARS, AND THERE IS A ONE HUNDRED MILLION DOLLAR SURPLUS OVER  
15 AND ABOVE WHAT IS NECESSARY FOR ACCRUED PROGRAM BENEFITS. THIS  
16 CLAIM IS NOT SUPPORTED BY THE TESTIMONY OF JOHN REIDHEAD, THE  
17 DIRECTOR OF FINANCE. MR. REIDHEAD TESTIFIED THAT THE MONEY  
18 REFERENCED BY THE PLAINTIFFS WAS THE FIGURE AGAINST WHICH  
19 CONTAINED CERTAIN LIABILITIES FOR THE CURRENT FISCAL YEAR,  
20 INCLUDING POST EMPLOYMENT BENEFIT LIABILITIES, AS WELL AS  
21 MEDICAID LIABILITIES, MAY BE RECORDED FOR ACCOUNTING PURPOSES.

22 HE ALSO TESTIFIED THAT THE TWO HUNDRED FORTY MILLION  
23 PLUS WAS AN ESTIMATED COST OF THE STATE'S LIABILITY FOR RETIREE  
24 BENEFITS AND WAS BASED UPON THE COST OF INSURANCE AS OF  
25 JUNE 30, 2004. NO ONE KNOWS WHAT THE COST MAY BE FIVE OR 10

1 YEARS FROM NOW. THE FACT IS THAT THERE IS NOT A ONE HUNDRED  
2 MILLION DOLLAR SURPLUS FOR ACCRUED PROGRAM BENEFITS.

3 THE LEGISLATURE CERTAINLY HAS A LEGITIMATE INTEREST  
4 IN DECIDING HOW TO ADDRESS THIS ISSUE AND TO ADDRESS THE  
5 LONG-TERM STABILITY OF THE STATE'S COMPENSATION SYSTEM.

6 OTHER EXAMPLES ARE ALSO PROVIDED BY THE STATE SUCH AS  
7 A POTENTIAL TAX -- SUCH AS POTENTIAL TAX LIABILITIES FOR  
8 EMPLOYEES IN THE STATE AND A CHANGE IN GOVERNMENT ACCOUNTING  
9 STANDARDS.

10 BINDING THE LEGISLATURE AND DEPRIVING IT OF ANY  
11 CONTROL OVER ITS OWN BUDGET IN FUTURE DEBTS IS OF SIGNIFICANT  
12 CONCERN. THE SUPREME COURT IN WEESE V DAVIS COUNTY  
13 COMMISSIONERS, AND I DON'T HAVE THE CITE TO THAT, HAS REJECTED  
14 THE USE OF ESTOPPEL TO BIND GOVERNMENTAL ENTITIES TO FUTURE  
15 PROMISES OF PUBLIC EMPLOYEE COMPENSATION. BASED UPON THIS THE  
16 ESTOPPEL CLAIM FAILS.

17 BASED UPON EVERYTHING THAT I'VE SAID, AND I RECOGNIZE  
18 THAT THIS IS COMPLICATED STUFF, AND I HAVEN'T COVERED  
19 EVERYTHING BECAUSE THERE'S TOO MUCH TO COVER, BUT BASED UPON  
20 EVERYTHING THAT I'VE SAID TODAY, I'M GRANTING DEFENDANT'S  
21 MOTION FOR JUDGMENT ON THE PLEADINGS.

22 HOWEVER, I WOULD LIKE TO RETURN FOR THE MOTION FOR  
23 PRELIMINARY INJUNCTION AND ADDRESS THOSE ISSUES FOR A MOMENT.  
24 THE IRREPARABLE HARM TO PLAINTIFFS. BECAUSE THE APPLICATION OF  
25 H.B. 213 DEPENDS ON NUMEROUS FACT-SPECIFIC QUESTIONS THE HARM



1 CLAIMED BY PLAINTIFFS IS TOO SPECULATIVE AND IT APPEARS FROM  
2 THE EVIDENCE THAT ANY HARM OCCURRED CAN BE COMPENSATED.

3 (2), THE BALANCE OF HARM. THIS ONE I STRUGGLED WITH  
4 MORE BECAUSE, CERTAINLY, AS I HAVE STATED, THAT IS SIGNIFICANT  
5 FISCAL CONCERNS OF THE STATE AND WHETHER THAT OUTWEIGHS THE  
6 HARM TO PLAINTIFF IS A TOUGH CALL.

7 NO. 3, THE ADVERSE TO THE PUBLIC INTEREST. I BELIEVE  
8 I HAVE CONCLUDED, IN MY DISCUSSION OF THE ESTOPPEL CLAIM, THAT  
9 ENJOINING H.B. 213 IS ADVERSE TO THE PUBLIC INTERESTS AND  
10 NOTHING FURTHER NEED BE SAID.

11 THE LAST ONE, SUBSTANTIAL LIKELIHOOD THAT PLAINTIFFS  
12 WILL PREVAIL ON THE MERITS. THIS, THEY CANNOT DO BECAUSE THEIR  
13 CLAIMS HAVE BEEN DISMISSED BY MY GRANTING DEFENDANT'S MOTION  
14 FOR JUDGMENT ON THE PLEADINGS.

15 THE PLAINTIFFS HAVE NOT MET THEIR BURDEN AND  
16 THEREFORE THE MOTION FOR PRELIMINARY INJUNCTION IS DENIED.

17 NOW, A LOT OF YOU PEOPLE OUT THERE, I HOPE THE  
18 LAWYERS HAVE UNDERSTOOD WHAT I'VE SAID, AND I BELIEVE THEY  
19 HAVE, THEY SPENT A LOT OF TIME ON THIS AND THEY'VE DONE A  
20 FANTASTIC JOB IN BRIEFING THE ISSUES, AND THIS IS NOT AN EASY  
21 CASE, BUT I CAN SUMMARIZE FOR THOSE THAT MAY HAVE SOME  
22 QUESTIONS IN THEIR MIND AS TO WHAT I'VE DONE.

23 THERE WERE THREE CLAIMS THAT I MENTIONED, BREACH OF  
24 CONTRACT, AND I'VE RULED THERE'S NO CONTRACT BETWEEN THE STATE  
25 AND EMPLOYEES. I'VE RULED THAT THE EMPLOYEES HAD NO VESTED

1 RIGHTS UNTIL THEY ACTUALLY RETIRE, AND THIS CLAIM FAILED.

2 THE TAKING CLAIM. I HAVE RULED THAT PLAINTIFFS DO  
3 NOT HAVE ANY VESTED RIGHTS UNTIL ACTUAL RETIREMENT, THEREFORE,  
4 PLAINTIFFS DO NOT HAVE RECOGNIZABLE AND CONSTITUTIONALLY  
5 PROTECTED PROPERTY INTERESTS. THIS CLAIM FAILS.

6 ESTOPPEL. I'VE RULED THAT THE PLAINTIFFS CANNOT  
7 ESTABLISH ALL OF THE ELEMENTS NECESSARY TO PREVAIL ON THIS  
8 CLAIM, AND IT FAILS.

9 SO BASED UPON THIS RULING THE MOTION FOR JUDGMENT ON  
10 THE PLEADINGS WAS GRANTED.

11 I'VE ALREADY DISCUSSED WITH YOU THE PRELIMINARY  
12 INJUNCTION ISSUES. I DON'T BELIEVE I NEED TO GO OVER THAT  
13 AGAIN.

14 I WANT TO THANK THE LAWYERS FOR THE FINE WORK THEY'VE  
15 DONE. I KNOW THAT THEY PUT A LOT OF TIME INTO THIS AND I  
16 APPRECIATE HOW WELL THEY BRIEFED IT. I APPRECIATE THE  
17 INFORMATION THAT THEY PROVIDED ME.

18 AND BASED UPON MY RULINGS TODAY I WOULD,  
19 MR. WADDOUPS, WILL YOU PREPARE AN ORDER WITH APPROPRIATE  
20 FINDINGS AND THAT ARE CONSISTENT WITH MY RULING TODAY?

21 MR. WADDOUPS: WE'LL DO THAT.

22 THE COURT: WE'LL BE IN RECESS. THANK YOU.

23 MR. HATHAWAY: YOUR HONOR, I'M SORRY. IF I MAY, I  
24 RESPECTFULLY MOTION THE COURT PURSUANT TO RULE 62C TO  
25 PRELIMINARILY ENJOIN THE EFFECTIVE DATE PENDING THE APPEAL OF

1 THIS MATTER SO AT LEAST -- THE COURT IS WELL AWARE THERE IS THE  
2 JANUARY 1ST EFFECT DATE, AND TO AVAIL THEMSELVES TO RETIREMENT  
3 A PUBLIC EMPLOYEE MUST PROVIDE NOTICE BY DECEMBER 16TH. AND AT  
4 LEAST, GIVEN THE COURT'S RULING, AND GIVEN THE IMPORTANT NATURE  
5 OF THIS CASE, AND GIVEN THE FASTLY APPROACHING DEADLINES, WE  
6 WOULD RESPECTFULLY REQUEST THE COURT EXERCISE ITS DISCRETION IN  
7 THAT REGARD, AT LEAST DURING THE PERIOD OF TIME THAT AN APPEAL  
8 CAN BE HAD.

9 THE COURT: MR. WADDOUPS?

10 MR. WADDOUPS: I THINK FOR THE REASONS THE COURT HAS  
11 ARTICULATED WELL THIS MORNING, THE PLAINTIFFS FAILED TO MEET  
12 THE REQUIREMENTS EVEN FOR A PRELIMINARY INJUNCTION PENDING  
13 INTERLOCUTORY APPEAL, WHICH, AT THIS POINT, WOULD BE COMPLETELY  
14 DISCRETIONARY. BUT I GUESS IT WOULDN'T BE DISCRETIONARY, IT  
15 WOULD BE FINAL ON THE MOTION FOR JUDGMENT ON THE PLEADINGS.  
16 BUT WE THINK ALL OF THE REASONS THAT YOU'VE JUST ARTICULATED  
17 APPLY TO AND SUGGEST THAT THE COURT SHOULD DENY THIS MOTION AS  
18 WELL.

19 THE COURT: I AGREE, AND IT IS DENIED. THANK YOU,  
20 GENTLEMEN. WE'LL BE IN RECESS.

21 LET ME GO BACK ON THE RECORD FOR JUST A MOMENT.  
22 THERE'S ONE THING I WANTED TO CLARIFY ABOUT THOSE E-MAILS. AND  
23 SOMEONE PROVIDED ME WITH, I ASSUME, AN E-MAIL WHERE U.P.E.A.  
24 SAYS THIS, JUST FOR THE RECORD. "YOU MAY HAVE RECENTLY  
25 RECEIVED AN E-MAIL FROM MR. GARR OVARD ENCOURAGING YOU, YOUR

1 SPOUSE AND OTHER PUBLIC EMPLOYEES TO E-MAIL YOUR FEELINGS ABOUT  
2 H.B. 213 TO THE JUDGE DECIDING U.P.E.A.'S MOTION SEEKING TO  
3 ENJOIN ENFORCEMENT OF H.B. 213. PLEASE BE ADVISED THAT THIS  
4 E-MAIL WAS NOT AUTHORIZED BY THE UTAH PUBLIC EMPLOYEES  
5 ASSOCIATION, NOR DOES THE U.P.E.A. AUTHORIZE OR SUPPORT THE  
6 ACTIONS ENCOURAGED BY MR. OVARD." AND THEN THERE ARE SOME  
7 ADDITIONAL THINGS.

8 SO I RECOGNIZE THAT U.P.E.A. WOULDN'T ENGAGE IN THAT  
9 KIND OF CONDUCT AND I JUST WANTED THAT STATED FOR THE RECORD.  
10 THANK YOU.

11 (WHEREUPON, THE HEARING WAS CONCLUDED).  
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C E R T I F I C A T E

STATE OF UTAH            )  
                              :  
COUNTY OF SALT LAKE )

I, EILEEN M. AMBROSE, C.S.R., DO CERTIFY THAT I AM A  
CERTIFIED SHORTHAND REPORTER AND OFFICIAL COURT REPORTER IN AND  
FOR THE STATE OF UTAH; THAT AS SUCH REPORTER, I ATTENDED THE  
PROCEEDINGS OF THE ABOVE-ENTITLED MATTER AT THAT TIME AND PLACE  
SET OUT HEREIN; THAT THEREAT I TOOK DOWN THE TESTIMONY GIVEN  
AND THE PROCEEDINGS HAD THEREIN; AND THAT THEREAFTER MY NOTES  
WERE TRANSCRIBED BY COMPUTER INTO THE FOREGOING PAGES; AND THAT  
THIS CONSTITUTES A FULL, TRUE AND CORRECT TRANSCRIPTION OF THE  
SAME.

  
EILEEN M. AMBROSE, C.S.R.

Attorneys for Plaintiffs/Petitioners

Petitioners Utah Public Employees Association (“UPEA”) and Roes 1 through 5 (collectively “Petitioners”) facially challenge the constitutionality of Utah Code § 67-19-14.2, as amended by House Bill 213, entitled Unused Sick Leave at Retirement Amendments (“HB 213”). HB 213 significantly devalues accrued, but unused sick leave of State employees. In a bench ruling issued December 8, 2005, the Third District Court (Hon. William W. Barrett) granted the State’s motion for judgment on the pleadings and denied Petitioners’ motions for a preliminary injunction and for a stay pending appeal. Petitioners seek emergency relief from that ruling under Rule 8A of the Utah Rules of Appellate Procedure because any appeal will be rendered meaningless if the appeal is not decided or the effective date of the statute is not stayed before **December 16, 2005**.

#### **STATEMENT OF RELIEF SOUGHT**

Petitioners respectfully request this Court to issue a writ (1) reversing the District Court’s bench ruling of December 8, 2005, and holding that HB 213 effects an unconstitutional taking; (2) directing the District Court to immediately enter a permanent injunction enjoining the enforcement/implementation of HB 213 insofar as it amends Utah Code § 67-19-14.2 or, alternatively, to immediately enter a stay/preliminary injunction enjoining the statute’s enforcement/ implementation pending further proceedings in this Court or the District Court; and (3) providing such other legal or equitable relief as may be necessary to protect Petitioners’ rights.

#### **STATEMENT OF FACTS JUSTIFYING EMERGENCY ACTION**

Absent a stay, HB 213 becomes effective January 1, 2006. Therefore, under established rules, State employees must retire by December 16, 2005 to avail themselves

of the current Unused Sick Leave Retirement Option Program. UPEA's members and Roes 1 through 5 are State employees who have accumulated substantial unused sick leave in reliance on the existing, decades-old Program. HB 213 changes the Program so as to reduce the value of 25% of that accumulated leave. Employees who are eligible to retire but do not wish to do so, including two of the Roe plaintiffs, face an immediate and irrevocable choice: Retire early or forfeit the full benefit of their unused sick leave.

Rule 8A provides the only viable means of appellate review given this time frame. The District Court denied a stay pending appeal. (Addendum [herein "Add."] at 13-14)

#### STATEMENT OF FACTUAL AND LEGAL GROUNDS ENTITLING PETITIONERS TO RELIEF

##### A. BACKGROUND FACTS

1. **The Current "Unused Sick Leave Retirement Option Program" Allows State Agencies to Offer a Substantial Retirement Benefit to Employees, and Employees Rely on that Benefit by Banking Sick Leave.**

For more than 25 years, the State has represented to its employees that employee benefits are an integral part of their current compensation, which is well below market rates. (Add. 28, 31-32) Indeed, the State trumpets its comparatively generous benefits "as inducements to work for the [S]tate." Utah Code Ann. § 67-19-3(16) (2005).<sup>1</sup> The Unused Sick Leave Retirement Option Program ("Program") is one particularly important benefit that State agencies may choose to offer as an inducement to their employees. *See id.* § 67-19-14(1) (1983) (authorizing DHRM to make rules "as an incentive to reduce sick leave abuse"). In its present form, the Program gives retiring

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<sup>1</sup> All citations to the Utah Code are to the relevant statutes as they stand *prior* to the amendments wrought by HB 213.



employees:

- Continuing medical and life insurance benefits for up to five years or until age 65, whichever occurs first; and
- In exchange for unused accumulated sick leave:
  - A cash payment or an employer contribution to a 401(k) retirement plan of **up to 25%** of the employee's unused accumulated sick leave at the employee's rate of pay at the time of retirement; and/or
  - Continuing medical and life insurance coverage (including Medicare supplemental insurance) for the employee and/or spouse at the rate of one month of coverage for every eight hours of unused sick leave, less a 480-hour reduction in the remaining amount of leave.

*See* Utah Code Ann. § 67-19-14.2 (2005).

The Program "is optional for each agency," and agencies must decide anew whether or not to offer the Program each fiscal year. Utah Admin. Code R477-7-6; *see* Utah Code Ann. § 67-19-14.2(1)(b). Moreover, for over two decades, agencies bore the costs of the Program for their employees without any legislative appropriation. *See* Utah Code Ann. § 67-19-14(d) (2004). Due to its popularity, essentially all State agencies have elected to offer the Program to their employees, including the agencies employing the Roe Plaintiffs. (Add. 33, 36, 39, 44, 46-47)

Over the Program's long history, the vast majority of retiring employees have deposited 100% of their unused sick leave (above the 480-hour threshold) to continue medical and life insurance coverage instead of taking any cash payout or retirement plan contribution. (Add. 34, 37-38, 40, 44, 47, 49) The continuing insurance coverage is far and away the most valuable use of accrued sick leave. In fact, the Program has created a substantial incentive for State employees to forego using their sick leave during their

employment so as to accumulate as much unused sick leave as possible for post-retirement insurance coverage. (Add. 37, 40, 44, 47)

All of the Roe Plaintiffs, like most eligible UPEA members and other State employees, intend to use their accrued leave to obtain post-retirement insurance coverage without taking a cash payment or retirement plan contribution. (Add. 34, 37-38, 40, 44, 47) In reliance on the Program, Petitioners have foregone taking sick leave during their employment by, for example, taking personal leave instead of sick leave when a medical need prevented them from working. The Roe Plaintiffs, alone, have banked more than 8,000 hours of unused sick leave. (Add. 34, 37-38, 40, 44, 47)

The widespread practice of banking sick leave has substantially benefited the State. It curbs sick leave abuses; saves the costs of replacement workers; maximizes productivity; and postpones expenses – with the State compensating employees years, or even decades, after unused leave accrues.

**2. HB 213 Changes the Program, and Unless Enjoined, Will Materially Devalue 25% of Employees' Banked Sick Leave.**

HB 213 will substantially change the Program, including how unused sick leave accumulated prior to January 1, 2006 may be used. Instead of allowing retiring employees to retain **all** unused sick leave above the 480-hour threshold, HB 213 **requires** employees to take 25% of their unused leave as an employer contribution to their 401(k) plans, which has a much lower value than the insurance coverage. (A copy of HB 213 is attached at Add. 17-24.)

Of course, the precise impact of HB 213 will vary by employee. However, no

employee will receive a net benefit from the change, and many, such as the Roe Plaintiffs who have thousands of hours of banked unused sick leave, will be significantly harmed. The Office of the Legislative Fiscal Analyst estimates a daily impact of approximately \$600 in the value of the unused sick leave: An employee paid \$20 an hour will receive a retirement plan contribution of \$160 per day of accrued leave. Under the current Program, that accrued leave could be deposited for one month of insurance for the retired employee and/or spouse worth \$760. (Add. 48)

Any employee wishing to avoid the effects of HB 213, which becomes effective January 1, 2006, must retire on or before December 16, 2005.<sup>2</sup> Roes 1 and 2, as well as other UPEA members, are eligible to retire and will be forced to do so to preserve the full value of their accumulated unused sick leave, although they had not planned to retire for some time (Add. 34, 38), unless this Court grants this emergency relief.

### **3. Proceedings Below**

In the District Court, Petitioners moved for a preliminary injunction to stay the effective date of HB 213 pending resolution of litigation. The State opposed that motion, and moved for judgment on the pleadings. After briefing and evidentiary hearings held November 7, 9, 16 and 18, 2005, the District Court on December 8, 2005 ruled from the bench denying Petitioners' motion and granting the State's motion. (Add. 11-12). The District Court also denied Petitioners' motion for a stay pending appeal. (Add. 14).

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<sup>2</sup> By statute, State employees may only retire on the 1<sup>st</sup> or the 16<sup>th</sup> day of the month. December 16, 2005 is the last day on which retirement is permitted before January 1, 2006. Utah Code Ann. §§ 49-12-401(2)(a); 49-13-401(2)(a).

## B. LEGAL ARGUMENT

### 1. HB 213 Effects an Unconstitutional Taking Without Just Compensation.

Ordinarily, public employment is a matter of statute, not contract, and the terms of employment, including compensation, can be changed at legislative whim. However, there are two exceptions to the general rule: First, an implied contract arises when “the government voluntarily undertakes an additional duty that it would otherwise have no obligation to perform.” *Buckner v. Kennard*, 2004 UT 78, ¶ 32, 99 P.3d 842. Second, employee benefits become contractual rights when they are vested. Under either scenario, to destroy or “materially lessen” the value of a contract right, as does HB 213, is an unconstitutional taking. *Colman v. Utah State Land Bd.*, 795 P.2d 622, 626 (Utah 1990).

a. The State Voluntarily Undertook a Contractual Duty. This Court broadly construed the voluntary undertaking exception in *Canfield v. Layton City*, 2005 UT 60, 122 P.3d 622. *Canfield* held that even when a government acts in the context of a larger statutory scheme, “an implied contract may ‘arise from a variety of sources, including the conduct of the parties, announced personnel policies, practices of that particular trade or industry, or other circumstances.’” *Id.* ¶ 17 (citations omitted). Thus, in *Canfield*, a state statute that gave cities discretion to set their own employment regulations “potentially create[d] obligations towards employees in addition to those imposed by state law” – the statute was an “enabling provision,” authorizing voluntary action, “rather than imposing specific obligations on cities in regard to their employees.” *Id.* ¶¶ 20, 21.

In exactly the same way, Utah Code § 67-19-14.2 is an “enabling provision” that authorizes State agencies, if they choose, to offer an employee benefit above and beyond those “imposed” by state law: “An agency may offer the Unused Sick Leave Retirement Option Program” (*id.* § 67-19-14.2(1)(b)), and “This program is optional for each agency” (Utah Admin. Code R477-7-6) (emphasis added). Contrary to the District Court’s conclusion, the fact that the statute defines a possible benefit does not render the agency’s decision of whether or not to extend the benefit any less voluntary or discretionary; after all, an agency must always act within its statutory parameters. Moreover, the agency must renew its election annually and independently fund the benefit, further confirming its voluntary nature. *Id.*<sup>3</sup>

An agency’s voluntary decision to offer the unused sick leave benefit creates a unilateral contract: Employees accept the offer, and thus the promise of future reward, by banking sick leave instead of using it as it accrues. After employees perform – using personal leave instead of sick leave for medical needs – the State cannot unilaterally alter or rescind the contract. But HB 213 does just that.<sup>4</sup>

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<sup>3</sup> *Canfield* distinguishes the Court of Appeals decision in *Knight v. Salt Lake County*, 2002 UT App. 100, 46 P.3d 247, on which the State relies, as involving a mandatory statute that “imposed specific obligations” on the government. *Canfield*, 2005 UT 60 ¶¶ 18-19 (emphasis added). The Program here does not involve such a statutory mandate.

<sup>4</sup> See, e.g., *Driggs v. Utah Teachers Retirement Board*, 142 P.2d 657, 661 (Utah 1943) (“The State is merely a collection of individuals, and there seems to be no logical reason why the collective entity should not be bound by the same concepts of justice and morality as its individual members, at least with respect to its contractual obligations.”); *Schofield v. Z.C.M.I.*, 39 P.2d 342, 345 (Utah 1934) (“Where services are performed under a statute providing for pensions, the pension becomes part of the contemplated compensation for services, and in a sense becomes part of the contract of employment.”).

b. Petitioners Have a Vested Contractual Right to the Program's Benefit.

Even assuming employees have a mere statutory interest in the Program, the State's freedom to alter the terms of the Program is limited. The benefit of the Program is vested as soon as employees bank their sick leave instead of using it. Thus, the State cannot modify the Program except "upon a showing that a vital state interest will be protected, and only where a substantial substitute is provided for in lieu of the loss of benefit[] sustained." *Ellis v. Utah State Retirement Bd.*, 757 P.2d 882, 885 (Utah App. 1988).

An employee's rights under the Program vest and create a contractual interest once the employee fulfills the conditions precedent to receiving the benefit. *Id.* at 886. Here, the benefit is no mere gratuity, but is offered as an inducement to forego using sick leave and continue employment with the State. *See* Utah Code Ann. § 67-19-14(1) (2004) ("The director shall, *as an incentive to reduce sick leave abuse*, make rules...." (emphasis added)); § 67-19-3(16) (2005) (defining "total compensation" to include "paid leave" and "other benefits offered to state employees as inducements to work for the state.")). As this Court stated in *Driggs*, "[t]he offer in such cases constitutes a promise for a completed act, and once the act is completed by the acceptor the offer cannot be modified or withdrawn. It becomes a binding contract." *Driggs*, 142 P.2d at 659.

Again, the Program's offer to State employees is this: If they work additional hours rather than use their sick leave, they can bank their unused sick leave for later compensation, to include one month of additional insurance coverage for every eight hours of unused sick leave over the 480-hour threshold. Employees, including the Roe Plaintiffs and UPEA members, have accepted that offer as they have foregone use of sick

leave time by working additional hours or by using “personal” leave for medical needs.

The fact that employees receive the promised payout upon retirement does not mean that the contract arises only at retirement. Employees accept the Program’s offer by their forbearance during the course of employment, not at retirement. In essence, by banking their sick leave, they purchase an option contract, which they then can exercise under the Program’s rules upon retirement. The Program is a classic form of deferred compensation: Employees earn the compensation over the course of their careers, and they then receive that compensation after they retire. *See* Prop. Reg. § 1.409A-1(b)(1); Black’s Law Dictionary, 7th ed. (“deferred compensation”). Indeed, the State essentially concedes this point by arguing that the current Program provides taxable compensation. *See* Prop. Reg. § 1.125-1 Q/A 7 (The Program cannot qualify as a cafeteria plan precisely because a cafeteria plan may not “offer[] a benefit that defers the receipt of compensation.”) In short, State employees have a vested contractual right to the compensation as soon as it is earned, and it is earned when they bank their sick leave, not when they retire.

c. The Taking is Substantial. Without an Equivalent Substitute. Whether or not the contract arises by State agencies voluntarily offering the Program or by the vesting of employee rights, the State cannot unilaterally diminish the contract benefit without effecting an unconstitutional taking. A taking exists under the Utah Constitution if there is “any substantial interference with private property which destroys or materially lessens its value, or by which the owner’s right to use and enjoyment is in any substantial degree abridged or destroyed.” *Colman*, 795 P.2d at 626 (emphasis added, internal

quotations omitted). The part of HB 213 that prevents use of 100% of unused sick leave for continued health and life insurance coverage will materially and substantially devalue 25% of accumulated unused sick leave. Therefore, that part of the statute indisputably effects a taking of Petitioners' contract rights.

To be sure, the magnitude of HB 213's impact on the Roe Plaintiffs, UPEA members, and other state employees will vary depending on their length of service, the amount of unused sick leave they have accumulated, and other factors. But that variation does not undermine the taking claim, its ripeness, or UPEA's associational standing to represent the interests of its members. This is a facial challenge to HB 213, not a damages claim or as-applied challenge. The aim is to enjoin a statute set to become effective within days before it irretrievably impacts Petitioners. There is no question this is an active and viable controversy. "As this allegation does not depend on the extent to which these particular petitioners are compensated, petitioners' facial challenge is ripe." *Yee v. City of Escondido*, 503 U.S. 519, 533, 112 S.Ct. 1522 (1992); *see also Utah Bankers Ass'n v. America First Credit Union*, 912 P.2d 988, 993 (Utah 1996) (holding that bank association had standing to assert members' claims because "claims for declaratory and injunctive relief would not need to be tailored to the needs of each individual member").<sup>5</sup>

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<sup>5</sup> Acknowledging an association's standing "has the advantage of permitting the prosecution of legitimate claims by an entity with the capacity to spread the costs of litigation among its members and to assume the burdens incident to it, rather than requiring a single litigant to carry the entire load"; "deny[ing] an association standing under such circumstances just might deter the assertion of valid claims without serving any countervailing public purpose." *Utah Restaurant Ass'n v. Davis County Bd. of*



HB 213's taking of Petitioners' contract rights is substantial. It will dramatically reduce the value of 25% of accrued employee benefits, which for the Roe Plaintiffs and other UPEA members means years of future insurance coverage.

As noted, the State Legislature's Fiscal Analyst estimated a daily impact of \$600 per employee, based on a salary of \$20 per hour and post-retirement insurance coverage worth \$760 per month. (Add. 48) Using these numbers, an employee with 1,000 hours of accumulated unused sick leave is entitled to receive 65 months of additional post-retirement health care coverage under the current Program – a **\$49,400 value** – after the 480-hour reduction. HB 213 forces the employee to cash out 25% of his or her accumulated unused sick leave as a 401(k) contribution of lesser value. Thus, the same employee would receive a 401(k) contribution of \$5,000, but could then receive only 33 months of additional post-retirement health care coverage – a **\$25,080 value**. All told, the employee ends up with approximately **\$19,000 less** under HB 213, or a **38% reduction in the benefit**. This is a substantial taking by any measure.

The State has argued that some employees could finagle as much insurance coverage under HB 213 as under the current Program. But the argument is misleading and would require robbing Peter to pay Paul.<sup>6</sup> Moreover, it minimizes HB 213's impact

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*Health*, 709 P.2d 1159, 1163 (Utah 1985) (association did not have standing for damages claims, which required direct participation by members).

<sup>6</sup> While HB 213 mandates a 25% 401(k) contribution, federal tax law caps that contribution by the amount of the employee's annual compensation. *See* I.R.C. § 415(c)(1)9, (d) (2005). The State has argued that an employee can quickly reach the cap – and use the rest of the 25% allotment for more insurance – either by retiring with just two days of salary on January 2<sup>nd</sup> or through other discretionary contributions. But that argument overlooks the fact that annual compensation includes the entire value of their

on employees, which is much more than mere dollars. In *Johnson v. Retirement Board*, 770 P.2d 93 (1988), this Court struck down an attempt to change a statute permitting sheriffs and police chiefs to collect retirement benefits while remaining employed. *Id.* at 94-95. As here, the State argued the change would not impact plaintiffs because they would receive the benefits later. However, the Court resoundingly rejected that argument:

This argument ignores the increased risk associated with delay that pensioners would be assuming under the modified plan. It makes the questionable assumption that the time value of money is irrelevant to plaintiffs' ultimate gross receipts. Most importantly, it oversimplifies the choice placed before the plaintiffs and fails to consider the possibility that plaintiffs may have already relied to their detriment on the immediate availability of these pension funds.

*Id.* at 96 (emphasis added). HB 213 forces employees immediately and irrevocably to decide retirement now to preserve unused sick leave they had banked for the future. Employees have sacrificed their personal leave time for illnesses or medical needs. In other words, they have spent their "vacations" being sick so that they could spend their healthy days on the job serving the people of Utah. HB 213 takes back the benefit the State promised for such sacrifices.

In sum, having taken contractual rights from State employees, HB 213 does not

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unused annual leave, comp time and excess hours, not just salary (*see* Utah Code Ann. § 67-19-3(16)) and it requires employees to pay out or to sacrifice other benefits they would otherwise be entitled to receive, such as vacation benefits.

The State has also made much of HB 213's phase out of the 480-hour threshold for exchanging unused sick leave. (Add. 21) However, the threshold phase-out directly corresponds with a phase out of the automatic 5-year extension of insurance coverage. The end result is that, five years from now, employees with at least 480 hours of unused sick leave can obtain the same amount of insurance coverage as they could today, while those with less than 480 hours will end up with less coverage. Again, no one is better off.

substitute another benefit of the same value as what has been taken. No employee will be better off, and most employees, including the Roe Plaintiffs, will be seriously injured if HB 213 is upheld. The entire focus of the bill is to “reduce personnel costs to the state” (Fiscal Note for HB 213, Add. 48), which it does on the backs of its most loyal and tenured employees without just compensation in return.

**2. This Court Should Issue a Permanent Injunction or, Alternatively, a Stay/Preliminary Injunction Blocking Implementation of HB 213 Pending Further Proceedings.**

**a. A Permanent Injunction is Appropriate.** The facts of this case are not in dispute, and as shown, HB 213 constitutes an unconstitutional taking of Petitioners’ contract rights. Since no factual issues remain, this Court should issue a permanent injunction enjoining implementation of HB 213.

**b. Alternatively, a Stay or Preliminary Injunction Should Be Issued Pending Further Proceedings.** At a minimum, this Court should issue a stay of HB 213 or a preliminary injunction halting its implementation pending further proceedings. A stay would be appropriate if this Court requires additional time to decide this case or if it prefers that the parties provide full appellate briefing in the course of an ordinary appellate schedule. A preliminary injunction would be appropriate if this Court concludes that further proceedings in the District Court are necessary (for example, if the Court believes there is a factual dispute over the value of the taking).

The District Court’s denial of a preliminary injunction is entitled to no deference because it was based not on factual findings, but rather on legal conclusions and unfounded factual assertions. *See Hunsaker v. Kersh*, 1999 UT 106, ¶ 6, 991 P.2d 67

(legal conclusions in ruling on preliminary injunction reviewed for correctness). A preliminary injunction would both satisfy the familiar criteria stated in Rule 65A as well as serve the purposes of injunctive relieve.

Injunctive relief is not purely limited to cases where no other possible remedy will be available. Its broader purpose is preventive in nature. A preliminary injunction is an anticipatory remedy purposed to prevent the perpetration of a threatened wrong or to compel the cessation of a continuing one. It further serves to preserve the status quo pending the outcome of the case.

*Id.* ¶ 8 (citations and internal quotation marks omitted).

*Irreparable harm.* The district court incorrectly ruled that the alleged harm was too speculative and that any actual harm could be compensated later. (Add. 11-12) State employees eligible to retire prior to the effective date of HB 213 will suffer irreparable harm because they must make an immediate decision whether to (1) retire by December 16, 2005 to avoid the loss of retirement benefits, or (2) risk an adverse outcome to this litigation. The premature loss of one's career, which often spells the loss of status and identity too, cannot be adequately compensated by damages.<sup>7</sup>

*Injury to Petitioners outweighs damage to State.* A few months delay in the implementation of HB 213 works no hardship on the State. HB 213 is a long-term fix whose purported benefits to the State will accrue only over many years. The State itself estimates that HB 213 will increase State retirement costs in the short term. (Add. 48) The injury to Petitioners and those like them from the loss of their careers and the

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<sup>7</sup> Judge Barrett's conclusion contradicted his own frank statement, made just before issuing his ruling, that HB 213 "may very well create a hardship for some" and that he was "sympathetic with those who have the time invested with the State who are impacted the most." (Add. at 3)

permanent loss of contract rights far outweighs any inconvenience to the State.

*No adverse impact on the public interest.* A preliminary injunction would not harm the public interest. Again, there is no crisis compelling an immediate change to the status quo, and there are short-term costs to implementation from costly early retirements. Moreover, the public interest is served by this Court enjoining an unconstitutional taking of Petitioners' contractual rights. Upholding important constitutional rights is not adverse to the public interest. *See Licensed Beverage Assn v. Leavitt*, 256 F.3d 1061, 1076 (10th Cir. 2001).

*Likelihood of success.* Lastly, for the reasons stated above, Petitioners are likely to succeed on the merits. At a minimum, this "case presents serious issues on the merits that should be subject of further litigation." Utah R. Civ. P. 65A(e).

### CONCLUSION

For the foregoing reasons, this Court should grant the requested relief.

### REQUEST FOR HEARING

Petitioners respectfully request a hearing on this matter.

DATED this 13 day of December, 2005.

KIRTON & McCONKIE

By: 

BENSON L. HATHAWAY, JR.

ALEXANDER DUSHKU

MATTHEW K. RICHARDS

STEPHEN W. GEARY

Attorneys for Plaintiffs/Petitioners

## CERTIFICATE OF SERVICE

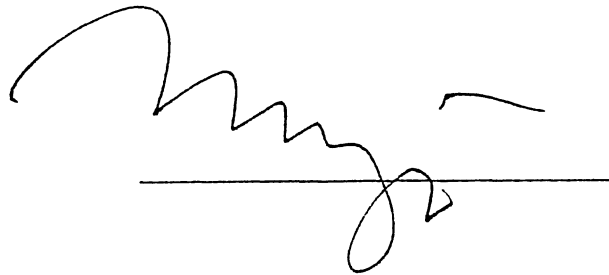
I hereby certify that on the 13 day of December, 2005, I caused to be delivered by the method indicated below a true and correct copy of the **PETITION FOR EMERGENCY RELIEF**, to the following:

☐ FEDERAL EXPRESS  
☐ U.S. MAIL  
☒ HAND DELIVERY  
☐ FAX TRANSMISSION

Clark Waddoups  
Heidi E.C. Leithead  
David C. Reymann  
Cheylynn Hayman  
PARR WADDOUPS BROWN GEE &  
LOVELESS  
185 South State Street, Suite 1300  
Salt Lake City, Utah 84111

☐ FEDERAL EXPRESS  
☒ U.S. MAIL  
☐ HAND DELIVERY  
☒ FAX TRANSMISSION

Thomas R. Lee  
524 JRCB  
Brigham Young University  
Provo, Utah 84602-8000

A handwritten signature in black ink, appearing to be 'Thomas R. Lee', is written over a horizontal line.

## ROE PLAINTIFF #1 - TERRY YOCKEY

Description	Current Program May 1, 2006	HB213 May 1, 2006	Difference
Accumulated Sick Leave Balance	1900	1900	
25% Mandatory 401(K) Contribution Of Unused Sick Leave		475	
Portion Of 25% Not Contributed Into 401(K) Due To Irs Limitations		0	
Subtotal	1900	1425	
Automatic Deduction	480	480	
Subtotal	1420	945	475
Purchase Additional Insurance (8 Hrs = 1 Month)	178	118	59
State-Paid Insurance Benefit Received (In Months)	32	32	0
Total 401(K) Contribution From Sick Leave		\$ 14,131	
Total Months Of Insurance	210	150	59
Present Value Of Insurance Benefits	\$81,366	\$48,794	
Present Value Of 401(K) Contribution	\$0	\$ 14,131	
<b>Total Amount Received For Accumulated Sick Leave</b>	<b>\$81,366</b>	<b>\$62,925</b>	<b>\$18,441</b>

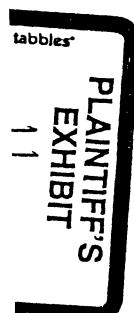
Notes:

Employee Birthdate: 12/11/1943

Spouse Birthdate: 9/23/1945

Dependents: No

00382



**CALCULATION OF VALUE OF ACCUMULATED SICK LEAVE UNDER CURRENT PROGRAM - ROE PLAINTIFF #1 - TERRY YOCKEY**

Description	Year Ended	Guaranteed Medical & Life Insurance Benefits (A)	Converted Medical & Life Insurance Benefits - Spouse (B)	Supplemental Coverage Benefits (C, D)	Current Value of Insurance	Probability of Collection - Based on Life Expectancy	Present Value Factor (E)	Present Value of Insurance
Months of Coverage		32	21	157				
Value Calculation - Insurance Coverage								
	4/30/2007	\$ 3,938	\$ -	\$ -	\$ 3,938	100.00%	1.07053	\$ 4,215
	4/30/2008	3,938	-	-	3,938	100.00%	1.12704	4,438
	4/30/2009	2,625	637	1,124	4,386	100.00%	1.18635	5,203
	4/30/2010	-	1,910	3,372	5,282	100.00%	1.24879	6,596
	4/30/2011	-	796	5,339	6,135	100.00%	1.31452	8,064
	4/30/2012	-	-	6,744	6,744	100.00%	1.38390	9,333
	4/30/2013	-	-	6,744	6,744	100.00%	1.45674	9,824
	4/30/2014	-	-	6,744	6,744	100.00%	1.53341	10,341
	4/30/2015	-	-	6,744	6,744	100.00%	1.61411	10,886
	4/30/2016	-	-	6,744	6,744	100.00%	1.69930	11,460
	4/30/2017	-	-	562	562	100.00%	1.78874	1,005
<b>Total</b>		<b>\$ 10,500</b>	<b>\$ 3,342</b>	<b>\$ 44,117</b>	<b>\$ 57,960</b>			<b>\$ 81,366</b>

Notes:

A) Value of Insurance assumed to be: \$ 328.14

B) Value of Insurance assumed to be: \$ 159.15

C) Value of Insurance assumed to be: \$ 281.00

D) The Medicare policy requires two policies, each at \$281 to cover both the employee and his/her spouse.

E) The present value factor is calculated as of December 31, 2005, using a net discount rate calculated as follows:

1 + Discount rate	104.50%
Divided by: 1 + Inflation Rate	110.00%
Subtotal	95.00000%
Less: 1	1.00
Equals: Net Discount Rate	-5.00000%



# **CALCULATION OF VALUE OF ACCUMULATED SICK LEAVE UNDER HB 213 - ROE PLAINTIFF #1 - TERRY YOCKEY**

Description	Year Ended	Guaranteed Medical & Life Insurance Benefits (A)	Converted Medical & Life Insurance Benefits - Spouse (B)	Supplemental Coverage Benefits (C, D)	Current Value of Insurance	Probability of Collection - Based on Life Expectancy	Present Value Factor (E)	Present Value of Insurance
Months of Coverage		32	21	97				
Value Calculation - Insurance Coverage								
4/30/2007	\$	3,938	\$ -	\$ -	\$ 3,938	100.00%	1.07053	\$ 4,215
4/30/2008		3,938	-	-	3,938	100.00%	1.12704	4,438
4/30/2009		2,625	637	1,124	4,386	100.00%	1.18635	5,203
4/30/2010		-	1,910	3,372	5,282	100.00%	1.24879	6,596
4/30/2011		-	796	5,339	6,135	100.00%	1.31452	8,064
4/30/2012		-	-	6,744	6,744	100.00%	1.38390	9,333
4/30/2013		-	-	3,372	3,372	100.00%	1.45674	4,912
4/30/2014		-	-	3,934	3,934	100.00%	1.53341	6,032
<b>Total</b>	<b>\$</b>	<b>10,500</b>	<b>\$ 3,342</b>	<b>\$ 23,885</b>	<b>\$ 37,728</b>			<b>\$ 48,794</b>

## Notes:

A) Value of Insurance assumed to be: \$ 328.14

B) Value of Insurance assumed to be: \$ 159.15

C) Value of Insurance assumed to be: \$ 281.00

D) The Medicare policy requires two policies, each at \$281 to cover both the employee and his/her spouse.

E) The present value factor is calculated as of December 31, 2005, using a net discount rate calculated as follows:

1 + Discount rate (Schedule 6)	104.50%
Divided by: 1 + Average Annual	110.00%
Subtotal	95.00000%
Less: 1	1.00
Equals: Net Discount Rate	<u><u>-5.00000%</u></u>

## ROE PLAINTIFF #2 - ROBERT H. ANDERSON

Description	Current Program May 1, 2006	HB213 May 1, 2006	Difference
Accumulated Sick Leave Balance	2300	2300	
25% Mandatory 401(K) Contribution Of Unused Sick Leave		575	
Portion Of 25% Not Contributed Into 401(K) Due To Irs Limitations		0	
Subtotal	2300	1725	
Automatic Deduction	480	480	
Subtotal	1820	1245	575
Purchase Additional Insurance (8 Hrs = 1 Month)	228	156	72
State-Paid Insurance Benefit Received (In Months)	60	60	0
Total 401(K) Contribution From Sick Leave		\$ 14,910	
Total Months Of Insurance	288	216	72
Present Value Of Insurance Benefits	\$134,869	\$93,675	
Present Value Of 401(K) Contribution	\$0	\$ 14,910	
Total Amount Received For Accumulated Sick Leave	\$134,869	\$108,585	\$26,284

Notes:

Employee Birthdate: 4/15/1947

Spouse Birthdate: 5/3/1947

Dependents: No

00385

**CALCULATION OF VALUE OF ACCUMULATED SICK LEAVE UNDER CURRENT PROGRAM - ROE PLAINTIFF #2 - ROBERT H. ANDERSON**

Description	Year Ended	Guaranteed Medical & Life Insurance Benefits (A)	Converted Medical & Life Insurance Benefits (A)	Supplemental Coverage Benefits (B, C)	Current Value of Insurance	Probability of Collection - Based on Life Expectancy	Present Value Factor (D)	Present Value of Insurance
Months of Coverage		60	-	228				
Value Calculation - Insurance Coverage								
	4/30/2007	\$ 3,938	\$ -	\$ -	\$ 3,938	100.00%	1.07053	\$ 4,215
	4/30/2008	3,938	-	-	3,938	100.00%	1.12704	4,438
	4/30/2009	3,938	-	-	3,938	100.00%	1.18635	4,671
	4/30/2010	3,938	-	-	3,938	100.00%	1.24879	4,917
	4/30/2011	3,938	-	-	3,938	100.00%	1.31452	5,176
	4/30/2012	-	-	6,744	6,744	100.00%	1.38390	9,333
	4/30/2013	-	-	6,744	6,744	100.00%	1.45674	9,824
	4/30/2014	-	-	6,744	6,744	100.00%	1.53341	10,341
	4/30/2015	-	-	6,744	6,744	100.00%	1.61411	10,886
	4/30/2016	-	-	6,744	6,744	100.00%	1.69930	11,460
	4/30/2017	-	-	6,744	6,744	100.00%	1.78874	12,063
	4/30/2018	-	-	6,744	6,744	100.00%	1.88288	12,698
	4/30/2019	-	-	6,744	6,744	100.00%	1.98198	13,366
	4/30/2020	-	-	6,744	6,744	100.00%	2.08659	14,072
	4/30/2021	-	-	3,372	3,372	100.00%	2.19641	7,406
<b>Total</b>		<b>\$ 19,688</b>	<b>\$ -</b>	<b>\$ 64,068</b>	<b>\$ 83,756</b>			<b>\$ 134,869</b>

**Notes:**

A) Value of Insurance assumed to be: \$ 328.14

B) Value of Insurance assumed to be: \$ 281.00

C) The Medicare policy requires two policies, each at \$281 to cover both the employee and his/her spouse.

D) The present value factor is calculated as of December 31, 2005, using a net discount rate calculated as follows:

1 + Discount rate	104.50%
Divided by: 1 + Inflation Rate	110.00%
Subtotal	95.00000%
Less: 1	1.00
Equals: Net Discount Rate	-5.00000%

**CALCULATION OF VALUE OF ACCUMULATED SICK LEAVE UNDER HB 213 - ROE PLAINTIFF #2 - ROBERT H. ANDERSON**

Description	Year Ended	Guaranteed Medical & Life Insurance Benefits (A)	Converted Medical & Life Insurance Benefits (A)	Supplemental Coverage Benefits (B, C)	Current Value of Insurance	Probability of Collection - Based on Life Expectancy	Present Value Factor (D)	Present Value of Insurance
Months of Coverage		60	-	156				
Value Calculation - Insurance Coverage								
	4/30/2007	\$ 3,938	\$ -	\$ -	\$ 3,938	100.00%	1.07053	\$ 4,215
	4/30/2008	3,938	-	-	3,938	100.00%	1.12704	4,438
	4/30/2009	3,938	-	-	3,938	100.00%	1.18635	4,671
	4/30/2010	3,938	-	-	3,938	100.00%	1.24879	4,917
	4/30/2011	3,938	-	-	3,938	100.00%	1.31452	5,176
	4/30/2012	-	-	6,744	6,744	100.00%	1.38390	9,333
	4/30/2013	-	-	6,744	6,744	100.00%	1.45674	9,824
	4/30/2014	-	-	6,744	6,744	100.00%	1.53341	10,341
	4/30/2015	-	-	6,744	6,744	100.00%	1.61411	10,886
	4/30/2016	-	-	6,744	6,744	100.00%	1.69930	11,460
	4/30/2017	-	-	6,744	6,744	100.00%	1.78874	12,063
	4/30/2018	-	-	3,372	3,372	100.00%	1.88288	6,349
<b>Total</b>		<b>\$ 19,688</b>	<b>\$ -</b>	<b>\$ 43,836</b>	<b>\$ 63,524</b>			<b>\$ 93,675</b>

**Notes:**

- A) Value of Insurance assumed to be: \$ 328.14  
 B) Value of Insurance assumed to be: \$ 281.00  
 C) The Medicare policy requires two policies, each at \$281 to cover both the employee and his/her spouse.  
 D) The present value factor is calculated as of December 31, 2005, using a net discount rate calculated as follows:
- |                                |           |
|--------------------------------|-----------|
| 1 + Discount rate (Schedule 6) | 104.50%   |
| Divided by: 1 + Average Annual | 110.00%   |
| Subtotal                       | 95.00000% |
| Less: 1                        | 1.00      |
| Equals: Net Discount Rate      | -5.00000% |

# ROE PLAINTIFF #4

Description	Current Program August 1, 2013	HB213 August 1, 2013	Difference
Accumulated Sick Leave Balance	1600	1600	
25% Mandatory 401(K) Contribution Of Unused Sick Leave		400	
Portion Of 25% Not Contributed Into 401(K) Due To Irs Limitations		0	
Subtotal	1600	1200	
Automatic Deduction	480	0	
Subtotal	1120	1200	-80
Purchase Additional Insurance (8 Hrs = 1 Month)	140	150	-10
State-Paid Insurance Benefit Received (In Months)	60	0	60
Total 401(K) Contribution From Sick Leave		\$ 10,952	
Total Months Of Insurance	200	150	50
Present Value Of Insurance Benefits	\$139,458	\$94,404	
Present Value Of 401(K) Contribution	\$0	\$ 10,952	
Total Amount Received For Accumulated Sick Leave	\$139,458	\$105,356	\$34,102

## Notes:

Employee Birthdate: 7/15/1953

Spouse Birthdate: N/A

Dependents: No

00388

PLAINTIFF'S  
EXHIBIT  
5/14/13

# **CALCULATION OF VALUE OF ACCUMULATED SICK LEAVE UNDER CURRENT PROGRAM - ROE PLAINTIFF #4**

Description	Year Ended	Guaranteed Medical & Life Insurance Benefits (A)	Converted Medical & Life Insurance Benefits (A)	Supplemental Coverage Benefits (B)	Current Value of Insurance	Probability of Collection - Based on Life Expectancy	Present Value Factor (C)	Present Value of Insurance
Months of Coverage		60	-	140				
Value Calculation - Insurance Coverage								
7/31/2014	\$	3,938	\$ -	\$ -	\$ 3,938	100 00%	1 55336	\$ 6,117
7/31/2015		3,938	-	-	3,938	100 00%	1 63511	6,439
7/31/2016		3,938	-	-	3,938	100 00%	1 72142	6,778
7/31/2017		3,938	-	-	3,938	100 00%	1 81202	7,135
7/31/2018		3,938	-	-	3,938	100 00%	1 90739	7,511
7/31/2019		-	-	3,372	3,372	100 00%	2 00777	6,770
7/31/2020		-	-	3,372	3,372	100 00%	2 11374	7,128
7/31/2021		-	-	3,372	3,372	100 00%	2 22499	7,503
7/31/2022		-	-	3,372	3,372	100 00%	2 34210	7,898
7/31/2023		-	-	3,372	3,372	100 00%	2 46537	8,313
7/31/2024		-	-	3,372	3,372	100 00%	2 59549	8,752
7/31/2025		-	-	3,372	3,372	100 00%	2 73209	9,213
7/31/2026		-	-	3,372	3,372	100 00%	2 87589	9,697
7/31/2027		-	-	3,372	3,372	100 00%	3 02725	10,208
7/31/2028		-	-	3,372	3,372	100 00%	3 18703	10,747
7/31/2029		-	-	3,372	3,372	100 00%	3 35476	11,312
7/31/2030		-	-	2,248	2,248	100 00%	3 53133	7,938
<b>Total</b>	<b>\$</b>	<b>19,688</b>	<b>\$ -</b>	<b>\$ 39,340</b>	<b>\$ 59,028</b>			<b>\$ 139,458</b>

## Notes

A) Value of Insurance assumed to be \$ 328 14

B) Value of Insurance assumed to be \$ 281 00

C) The present value factor is calculated as of December 31, 2005, using a net discount rate calculated as follows:

1 + Discount rate	104 50%
Divided by 1 + Inflation Rate	110 00%
Subtotal	95 00000%
Less 1	1 00
Equals Net Discount Rate	-5 00000%

# **CALCULATION OF VALUE OF ACCUMULATED SICK LEAVE UNDER HB 213 - ROE PLAINTIFF #4**

Description	Year Ended	Guaranteed Medical & Life Insurance Benefits (A)	Converted Medical & Life Insurance Benefits (A)	Supplemental Coverage Benefits (B)	Current Value of Insurance	Probability of Collection - Based on Life Expectancy	Present Value Factor (C)	Present Value of Insurance
Months of Coverage		-	60	90				
Value Calculation - Insurance Coverage								
7/31/2014	\$	-	\$ 3,938	\$ -	\$ 3,938	100 00%	1 55336	\$ 6,117
7/31/2015		-	3,938	-	3,938	100 00%	1 63511	6,439
7/31/2016		-	3,938	-	3,938	100 00%	1 72142	6,778
7/31/2017		-	3,938	-	3,938	100 00%	1 81202	7,135
7/31/2018		-	3,938	-	3,938	100 00%	1 90739	7,511
7/31/2019		-	-	3,372	3,372	100 00%	2 00777	6,770
7/31/2020		-	-	3,372	3,372	100 00%	2 11374	7,128
7/31/2021		-	-	3,372	3,372	100 00%	2 22499	7,503
7/31/2022		-	-	3,372	3,372	100 00%	2 34210	7,898
7/31/2023		-	-	3,372	3,372	100 00%	2 46537	8,313
7/31/2024		-	-	3,372	3,372	100 00%	2 59549	8,752
7/31/2025		-	-	3,372	3,372	100 00%	2 73209	9,213
7/31/2026		-	-	1,686	1,686	100 00%	2 87589	4,849
<b>Total</b>	<b>\$</b>	<b>-</b>	<b>\$ 19,688</b>	<b>\$ 25,290</b>	<b>\$ 44,978</b>		<b>\$</b>	<b>94,404</b>

## Notes

A) Value of Insurance assumed to be \$ 328 14

B) Value of Insurance assumed to be \$ 281 00

C) The present value factor is calculated as of December 31, 2005, using a net discount rate calculated as follows:

1 + Discount rate (Schedule 6)	104 50%
Divided by 1 + Average Annual	110 00%
Subtotal	95 00000%
Less 1	1 00
Equals Net Discount Rate	-5 00000%

# ROE PLAINTIFF #5

Description	Current Program August 1, 2026	HB213 August 1, 2026	Difference
Accumulated Sick Leave Balance	800	800	
25% Mandatory 401(K) Contribution Of Unused Sick Leave		200	
Portion Of 25% Not Contributed Into 401(K) Due To Irs Limitations		0	
Subtotal	800	600	
Automatic Deduction	480	0	
Subtotal	320	600	-280
Purchase Additional Insurance (8 Hrs = 1 Month)	40	75	-35
State-Paid Insurance Benefit Received (In Months)	60	0	60
Total 401(K) Contribution From Sick Leave		\$ 3,546	
Total Months Of Insurance	100	75	25
Present Value Of Insurance Benefits	\$120,918	\$85,687	
Present Value Of 401(K) Contribution	\$0	\$ 3,546	
Total Amount Received For Accumulated Sick Leave	\$120,918	\$89,233	\$31,685

## Notes:

Employee Birthdate: 7/15/1964

Spouse Birthdate: 1/11/1969

Dependents: Yes

00391



# **CALCULATION OF VALUE OF ACCUMULATED SICK LEAVE UNDER CURRENT PROGRAM - ROE PLAINTIFF #5**

Description	Year Ended	Guaranteed Medical & Life Insurance Benefits (A)	Converted Medical & Life Insurance Benefits (A)	Supplemental Coverage Benefits (B)	Current Value of Insurance	Probability of Collection - Based on Life Expectancy	Present Value Factor (C)	Present Value of Insurance
Months of Coverage		60	40	-				
Value Calculation - Insurance Coverage								
	7/31/2027	\$ 3,938	\$ -	\$ -	\$ 3,938	100 00%	3 02725	\$ 11,920
	7/31/2028	3,938	-	-	3,938	100 00%	3 18703	12,549
	7/31/2029	3,938	-	-	3,938	100 00%	3 35476	13,210
	7/31/2030	3,938	-	-	3,938	100 00%	3 53133	13,905
	7/31/2031	3,938	-	-	3,938	100 00%	3 71719	14,637
	7/31/2032	-	3,938	-	3,938	100 00%	3 91338	15,410
	7/31/2033	-	3,938	-	3,938	100 00%	4 11935	16,221
	7/31/2034	-	3,938	-	3,938	100 00%	4 33616	17,074
	7/31/2035	-	1,313	-	1,313	100 00%	4 56437	5,991
<b>Total</b>		<b>\$ 19,688</b>	<b>\$ 13,126</b>	<b>\$ -</b>	<b>\$ 32,814</b>			<b>\$ 120,918</b>

## Notes

A) Value of Insurance assumed to be \$ 328 14

B) Value of Insurance assumed to be \$ 281 00

C) The present value factor is calculated as of December 31, 2005, using a net discount rate calculated as follows

1 + Discount rate	104 50%
Divided by 1 + Inflation Rate	110 00%
Subtotal	95 00000%
Less 1	1 00
Equals Net Discount Rate	-5 00000%

# **CALCULATION OF VALUE OF ACCUMULATED SICK LEAVE UNDER HB 213 - ROE PLAINTIFF #5**

Description	Year Ended	Guaranteed Medical & Life Insurance Benefits (A)	Converted Medical & Life Insurance Benefits (A)	Supplemental Coverage Benefits (B)	Current Value of Insurance	Probability of Collection - Based on Life Expectancy	Present Value Factor (C)	Present Value of Insurance
Months of Coverage		-	75	-				
Value Calculation - Insurance Coverage								
7/31/2027	\$	-	\$ 3,938	\$ -	\$ 3,938	100 00%	3 02725	\$ 11,920
7/31/2028		-	3,938	-	3,938	100 00%	3 18703	12,549
7/31/2029		-	3,938	-	3,938	100 00%	3 35476	13,210
7/31/2030		-	3,938	-	3,938	100 00%	3 53133	13,905
7/31/2031		-	3,938	-	3,938	100 00%	3 71719	14,637
7/31/2032		-	3,938	-	3,938	100 00%	3 91338	15,410
7/31/2033		-	984	-	984	100 00%	4 11935	4,055
<b>Total</b>	<b>\$</b>	<b>-</b>	<b>\$ 24,611</b>	<b>\$ -</b>	<b>\$ 24,611</b>			<b>\$ 85,687</b>

## Notes

A) Value of Insurance assumed to be \$ 328 14

B) Value of Insurance assumed to be \$ 281 00

C) The present value factor is calculated as of December 31, 2005, using a net discount rate calculated as follows

1 + Discount rate (Schedule 6)	104 50%
Divided by 1 + Average Annual	110 00%
Subtotal	95 00000%
Less 1	1 00
Equals Net Discount Rate	<u>-5 00000%</u>